No. 88-461

Supreme Court, U.S.
FILED
AUG 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

KIMBER PETROLEUM CORPORATION,

Appellant,

vs.

CHRISTOPHER J. DAGGETT, Acting Commissioner, STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellee.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT AND APPENDIX

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QUESTION PRESENTED

Whether a recipient of a directive issued by the State of New Jersey Department of Environmental Protection pursuant to the New Jersey Spill Compensation and Control Act is denied due process.

PARTIES

The parties appearing in the New Jersey Supreme Court were Kimber Petroleum Corporation and Solar Oil Company, appellants below and the State of New Jersey Department of Environmental Protection, appellee below.

The appellant for this appeal is Kimber Petroleum Corporation.* The appellee is Christopher J. Daggett, Acting Commissioner, State of New Jersey Department of Environmental Protection.

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* As required by Supreme Court Rule 21.1 and 28.1, the following is a listing of the parents, subsidiaries (except wholly-owned subsidiaries) and affiliates of appellant: Carleton Oil Corp. and S.K.S. Inc.

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No.

In The

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October Term, 1988

KIMBER PETROLEUM CORPORATION,

Appellant,

vs.

CHRISTOPHER J. DAGGETT, Acting Commissioner, STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellee.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

Kimber Petroleum Corporation prays that the Court review a judgment entered by the New Jersey Supreme Court which upheld the constitutionality of the enforcement mechanism of the New Jersey Spill Compensation and Control Act.

OPINIONS BELOW

The opinion of the New Jersey Supreme Court is reported at 110 N.J. 69 (1988).

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on April 18, 1988. A timely petition for rehearing was denied without comment by Order filed on May 25, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The New Jersey Spill Compensation and Control Act (hereinafter the "Spill Act"), N.J.S.A. 58:10-23.11 to -23.11z and the Fifth and Fourteenth Amendments to the United States Constitution are involved in the case.

STATEMENT OF CASE

A. PROCEDURAL HISTORY

On May 29, 1986 a directive was issued by the New Jersey Department of Environmental Protection (hereinafter "DEP") to Kimber Petroleum Corporation (hereinafter "Kimber"), Solar Oil Company (hereinafter "Solar") and Shell Oil pursuant to the New Jersey Spill Compensation and Control Act N.J.S.A. 58:10-23.11 to -23.11(Z) (hereinafter "Spill Act), directing the recipients to pay $2,164,137.00 to fund the cost of certain work outlined in the directive. The work consisted primarily of the construction of a new water system in an area of West Milford, New Jersey, only part of which was alleged to be suffering from contamination being attributed to the recipients of the directive.

The directive required the recipients to pay the $2,164,137.00 within 30 days or face substantial penalties including treble damages.

On July 17, 1986, Kimber and Solar filed a Notice of Appeal from the directive with the New Jersey Superior Court, Appellate Division. Kimber and Solar also requested the Appellate Division to enter an Order staying the enforcement of the directive and its penalty provisions during the pendency of the appeal. The Court entered a temporary stay pending further consideration of the motion up to and including July 31, 1986. DEP filed a brief in opposition to the application on July 25, 1986. On July 26, 1986, Kimber and Solar filed a reply brief.

On July 31, 1986, the Appellate Division denied the motion for a stay. Kimber and Solar moved before Associate Justice Robert L. Clifford pursuant to the New Jersey Court Rules seeking, among other things, an Order staying the decision and/or action of the DEP embodied in its directive and for an Order enjoining DEP from seeking sanctions, including treble damages against them during the pendency of their appeal.

Justice Clifford entered an Order on that date staying the directive pending consideration of the request for a stay by the full Court.

On October 20, 1986, the New Jersey Supreme Court entered an Order reserving decision on the motion to supplement the record, granting appellants motions to accelerate the appeal and to file an overlength brief and certifying to that Court the appeal pending in the Appellate Division. The Court also stayed the treble damage portion of the directive provided the recipients either posted a bond or made a direct payment in the amount of the directive to the DEP. Kimber complied with this order and posted adequate security so that the DEP was enjoined from seeking or imposing sanctions or penalties, including treble damages, based

upon Kimber's failure to pay the amount of the directive pending disposition of the appeal.

On April 18, 1988 the New Jersey Supreme Court issued an opinion in which it performed "judicial surgery" on the enforcement mechanism of the Spill Act. Upon completion of the "judicial surgery" the Court found the Spill Act constitutional under both the New Jersey and United States Constitutions and then upheld the directive issued by the DEP to Kimber and Solar.

On April 28, 1988 Kimber filed a timely motion for reconsideration seeking clarification of the New Jersey Supreme Court's Opinion. On May 4, 1988 the DEP filed opposition to that motion. In an order signed by the Clerk of the New Jersey Supreme Court on May 24, 1988 and filed on May 25, 1988 the Court denied the motion for reconsideration without comment.

Kimber appeals from the opinion and order of the New Jersey Supreme Court upholding the constitutionality of the Spill Act under the United States Constitution.

B. BACKGROUND AND FACTUAL ALLEGATIONS

This appeal involves the constitutionality of the Spill Act under the United States Constitution. Appellant challenges the constitutionality of the Spill Act on its face and as construed by the New Jersey Supreme Court. Kimber also challenges the Act as applied to Appellant under the circumstances of the directive issued to it by the DEP and upheld by the New Jersey Supreme Court. Appellant submits that the Spill Act violated its due process rights by failing to afford it a hearing to challenge the validity of the Administrative Directive without subjecting it to mandatory treble damages. Appellant was coerced into posting security for the amount of the directive in order to avoid treble damages during the pendency of the appeal even though it has good cause to

challenge various aspects of the directive. For example, fundamental factual issues exist with respect to the underlying basis of the issuance of the directive, including the identity of proper parties, the propriety of the scope of remediation, the costs of the remediation plan and the responsibilities of the parties for the alleged damages. The exercise of its right to judicial review of the directive has resulted in a penalty to Kimber.

The Spill Act provides no mechanism through which a party determined to be a recipient by DEP may challenge that determination or the potentially ruinous consequences which result from such a determination without subjecting themselves to treble damages.

N.J.S.A. 58:10-23.11f(a) provides, in pertinent part, that:

> Whenever any hazardous substance is discharged, the Department may in its discretion, act to remove or arrange for the removal of such discharge or may direct the discharger to remove, or arrange for the removal of, such discharge . . . Any discharger who fails to comply with such a directive *shall* be liable to the Department in an amount equal to three times the cost of such removal. (emphasis added).

There is no method under the statutory scheme for a recipient of a directive to seek administrative or judicial review of the DEP determination, unless that recipient is so bold as to be willing to assume the risk of having mandatory treble damages imposed against it. Prior to the New Jersey Supreme Court decision, the only defenses available to a recipient challenging a directive were found in N.J.S.A. 58:10-23.11g(d) which states:

> An act of omission caused solely by war, sabotage, or God, or a combination thereof, shall be the only defenses which may be raised by any owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this act.

"Good faith" or "good cause" defenses were, therefore, not relevant to an inquiry as to whether a party should be saddled with treble damages.

In its opinion below the New Jersey Supreme Court found that "[w]ithout an implied good cause, or reasonable cause exception the statute may infringe the state or federal constitution." 110 N.J. 69, 82 (1988). The Court then engrafted good cause defenses upon the Spill Act and upheld its constitutionality and affirmed the directive issued to Kimber subject to any good-cause defense that may be raised by Kimber.

Notwithstanding this holding, the Court then opined that since it had "ordered the parties to pay the remedial costs assessed by the directive or security for those costs" and had "for purposes of this appeal excused liability for treble damages based upon the earlier failure of the parties to have complied with the DEP directive," good cause defenses would not be considered by the Court with respect to Kimber.

The DEP takes the position that because Kimber complied with the Court's order to post security, Kimber waived its right to raise those good cause defenses the Court engrafted onto the Spill Act in order to find the Spill Act constitutional.

Kimber brought its motion for reconsideration in an attempt to clarify how it was to be able to present its good faith defenses. The motion for reconsideration was denied without comment.

As a consequence, at no point has Kimber been given nor will it be given the opportunity to challenge in an administrative or judicial forum the factual basis or scope of the directive issued to it by the DEP.

C. THE ENFORCEMENT MECHANISM OF THE SPILL COMPENSATION AND CONTROL ACT UNCONSTITUTIONALLY DEPRIVED KIMBER PETROLEUM CORPORATION OF DUE PROCESS.

This case demonstrates the unconstitutional and impermissible effect of DEP Directives upon any party who may be responsible to the slightest degree under the Spill Act. The statutory requirements of the Spill Act to make payment absent any opportunity to challenge the enforcement mechanism prior to payment results in an unconstitutional deprivation of procedural due process rights afforded all litigants under the Fifth and Fourteenth Amendments of the United States Constitution. These constitutional infirmities are compounded by the fact that any attempt to challenge the enforcement mechanism prior to payment subjects such a bold litigant to the imposition of mandatory treble damages if the litigant is subsequently found to be to any degree responsible for the hazardous discharges at issue. [N.J.S.A. 58:10-23.11f(a)]. The effect is to chill appellant's constitutional right to seek judicial review of DEP's actions.

Furthermore, the post-payment remedies provided for under the claims procedure of the Spill Act, N.J.S.A. 58:10-23.11g-q also fail to provide a meaningful opportunity for litigants to raise defenses to the sanctions imposed upon them. More critically, recipients of directives found to be responsible to any degree apparently do not have even the post-payment claims procedure available to them. *State, Dept. of Environ. Protect. v. Ventron Corp.*, 182 N.J. Super. 210, 228 (App. Div. 1981), *mod. on other grounds*, 94 N.J. 473 (1983).

The New Jersey Supreme Court attempts to remedy the constitutional infirmity it found with the Spill Act by providing that good cause defenses can be raised by recipients of directives at an enforcement proceeding. As a result of Kimber's challenge to the Spill Act and compliance with the New Jersey Supreme Court's order to post security in the amount of the directive, it apparently is to be denied the very right to raise good cause defenses all other DEP Directive recipients are granted. This result is patently wrong and fundamentally unfair.

D. RECIPIENTS OF DIRECTIVES ISSUED BY THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION HAVE A DUE PROCESS RIGHT TO CHALLENGE THE VALIDITY OF THE ADMINISTRATIVE ORDER WITHOUT BEING SUBJECT TO PENALTIES.

It is well settled that a person has a due process right to challenge the validity of an administrative order without fear of massive mandatory penalties if the challenge is unsuccessful. This Court recognized this basic proposition of law as early as 1908 in the case of *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 32 L. Ed. 714. Since the *Young* decision, the United States Supreme Court has repeatedly reaffirmed this principle. For instance, in *Oklahoma Operating Co. v. Love,* 252 U.S. 331, 336 (1920), Justice Brandeis noted that where penalties are so excessive as to "deter even the boldest and most confident" party from litigating a matter, then that party has been denied due process.

A basic requirement of due process is that a party be afforded an opportunity to be heard at a hearing conducted at a meaningful time and in a meaningful manner. *Goldberg v. Kelly,* 397 U.S. 254, 90 S. Ct. 1011 (1970) (pretermination evidentiary hearing required before welfare benefits can be terminated); *Armstrong v. Manzo,* 380 U.S. 545, 85 S.Ct. 1187 (1965) (hearing required before parental rights can be terminated).

Kimber submits that a statute which forces it to risk the imposition of mandatory treble damages in order to challenge a directive is invalid.

Kimber believes that adding a good cause defense to the Spill Act modeled after the federal Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9607(c)(3)(1982), as the New Jersey Supreme Court has done, is insufficient to save the statute.

Kimber raised the issue of denial of its due process rights in its applications for stays in the New Jersey Superior Court, Appellate Division and the New Jersey Supreme Court as well as its challenge to the Spill Act on the merits before the New Jersey Supreme Court. The Court, in its opinion, rejected this challenge when it engrafted the good cause defenses onto the statute.

Even assuming this Court were to find the Spill Act as modified by the New Jersey Supreme Court constitutional, its application to Kimber fails to meet constitutional muster. The actions of the New Jersey Supreme Court, in ordering Kimber to post security for the amount of that directive in order to avoid treble damages, has deprived Kimber of the right to the good cause defenses the Court felt compelled to engraft onto the statute to make it constitutional.

REASONS FOR GRANTING THE APPEAL

GRANTING THIS APPEAL AND PROVIDING PLENARY CONSIDERATION WILL PROVIDE KIMBER WITH DUE PROCESS UNDER THE UNITED STATES CONSTITUTION.

The issues raised by this appeal have broad implications with respect to the enforcement mechanisms employed to force

compliance with federal and state environmental cleanup statutes. Kimber seeks this review not only to address those broad issues but also to enable it to receive the right to raise good cause defenses which the New Jersey Supreme Court felt necessary to engraft onto the Spill Act so that the Spill Act could survive Kimber's constitutional challenge.

Kimber's predicament is directly the result of the combination of three actions by the New Jersey Supreme Court. The first action of the New Jersey Supreme Court that placed Kimber in this position was its order compelling Kimber to post security for the $1,882,137.00[1] full amount of the directive in order to avoid the penalty provisions, including the treble damage provision, of the Spill Act. (Kimber complied with this order).[2] The second action of the New Jersey Supreme Court was its determination to legislate a change in the Spill Act rather than simply hold the act of the legislature unconstitutional. The third action of the New Jersey Supreme Court was its affirmance of the directive issued to Kimber.

Unless this Court grants Kimber's appeal and provides Kimber with a plenary hearing, Kimber will be left without a remedy. It will be deprived of due process under the United States Constitution because of the actions of the New Jersey Supreme Court.

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1. On March 3, 1987, the DEP issued Directive II which, among other things, reduced the original directive by $282,000.00.

2. Ironically, since Solar did not comply with the Supreme Court's order it would have a right to assert good cause defenses in any cost recovery action brought by DEP.

CONCLUSION

Wherefore, appellant respectfully requests that this Court grant it a plenary hearing on this appeal.

Respectfully submitted,

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APPENDIX A — OPINION OF THE SUPREME COURT OF NEW JERSEY DATED APRIL 18, 1988 (110 N.J. 69)

IN THE MATTER OF THE DIRECTIVE OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ISSUED TO KIMBER PETROLEUM CORPORATION, SHELL OIL COMPANY AND SOLAR OIL COMPANY.

Argued November 18, 1986—Decided April 18, 1988.

SYNOPSIS

Alleged dischargers of hazardous waste appealed Department of Environmental Protection directive requiring them to pay over $2 million to fund construction of alternate water supply, and sought stay of order pending appeal. The Superior Court, Appellate Division, denied motion for stay and certified appeal. The Supreme Court, Handler, J., held that: (1) directive requiring alleged dischargers to pay for construction of alternative water supply required by local groundwater contamination was implicitly within broad authority granted DEP under the Spill Compensation and Control Act and under the DEP's authorizing legislative; (2) treble damages need not be assessed under the Spill Act if party opposing such damages has objectively reasonable basis for believing that DEP's directive was invalid or inapplicable to party; and (3) record was insufficient to determine whether dischargers could be required to pay for creation of alternative long-term water supply.

Affirmed as modified.

Wilentz, J., filed dissenting opinion.

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1. Health and Environment ⇐25.7(23)

Department of Environmental Protection's directive requiring alleged dischargers to pay for construction of alternative

water supply required by local groundwater contamination was implicitly within broad authority granted DEP under the Spill Compensation and Control Act and under the DEP's authorizing legislative, even though the Spill Act directly authorized DEP only to remove waste and bring cost recovery action against responsible parties or to direct responsible party to remove waste. N.J.S.A. 13:1D–1 to 13:1D–19, 58:10–23.11g, subds. c, d, 58:10–23.11q.

2. Arbitration ⇐29.2

Arbitration provisions of Spill Compensation and Control Act do not limit arbitrator's powers to considering challenges to amount of costs, but, rather, are broad enough to cover any challenge to validity of any aspect of directive; however, remedy is illusory in most cases due to Department of Environment Protection's position that no recourse to fund or arbitration procedures may be had by partially responsible discharger. N.J.S.A. 58:10–23.11n, 58:10–23.11n, subds. a, c, d, g.

3. Health and Environment ⇐25.5(10)

Spill Compensation and Control Act does not require assessment of treble damages against party not complying with directive of Department of Environmental Protection if party had objectively reasonable basis for believing that directive was invalid or inapplicable to party. N.J.S.A. 58:10–23.11 et seq.

4. Health and Environment ⇐25.15(3.2)

Any decision by the Department of Environmental Protection to seek treble damages in recovery action under the Spill Compensation and Control Act is subject to judicial review like any other agency action. N.J.S.A. 58:10–23.11 et seq.

Appendix A

5. Health and Environment ⇐25.5(10)

"Good-cause defense" to treble damages provisions of the Spill Compensation and Control Act is relevant only when discharger refuses to comply with Department of Environmental Protection directive and DEP moves in court to enforce directive; if the court determines that discharger's basis for noncompliance is objectively reasonable, even if court does not ultimately uphold discharger's argument, DEP's request for treble damages may be rejected if not reasonable in light of all circumstances. N.J.S.A. 58:10–23.11 et seq.

6. Health and Environment ⇐25.5(5.5)

Party even remotely responsible for causing contamination is deemed "responsible party" under the Spill Compensation and Control Act. N.J.S.A. 58:10–23.11g, subd. c.

7. Health and Environment ⇐25.15(5.1)

Record was insufficient to determine on appeal whether alleged dischargers could be required to pay for creation of alternative long-term water supply, under Spill Compensation and Control Act. N.J.S.A. 58:10–23.11 et seq.

8. Health and Environment ⇐25.5(10)

In appropriate case, aggrieved party should have right, in action for reimbursement to recover costs of Department of Environmental Protection under the Spill Compensation and Control Act, to demonstrate that element of costs imposed by DEP is unreasonable; same contention raised on objectively reasonable basis could be "good-cause defense" to prepayment enforcement directive. N.J.S.A. 58:10–23.11 et seq.

Appendix A

Edwin R. Matthews and *Edward J. Farrell* argued the cause for appellants, Kimber Petroleum and Solar Oil Company (*Budd, Larner, Gross, Picillo, Rosenbaum, Greenberg & Sade*, attorneys for Kimber Petroleum Corporation, and *Farrell, Curtis, Carlin & Davidson*, attorneys for Solar Oil Company; *Edwin R. Matthews, Edward J. Farrell, John D. O'Dwyer* and *Nancy Giacumbo*, on the briefs).

Ross A. Lewin, Deputy Attorney General, argued the cause for respondent, Department of Environmental Protection (*W. Cary Edwards*, Attorney General of New Jersey, attorney; *James J. Ciancia*, Assistant Attorney General, and *Michael R. Clancy*, Deputy Attorney General, of counsel; *Ross A. Lewin* and *John A. Covino*, Deputy Attorneys General, on the briefs).

James W. Christie submitted a brief on behalf of *amicus curiae*, Township of Gloucester (*Griffith, Burr, Angelini & Viniar*, attorneys).

William H. Hyatt, Jr. and *William J. Friedman* submitted a brief on behalf of *amici curiae*, Woodland Study Group, Minnesota Mining and Manufacturing Company and Rohm and Haas Company (*Pitney, Hardin, Kipp & Szuch*, attorneys).

The opinion of the Court was delivered by

HANDLER, J.

In 1984, the Department of Environmental Protection (DEP) investigated the source of a serious groundwater contamination in the Township of West Milford. The contamination was traced to an Amoco gasoline station leased by Kimber Petroleum Corporation and a Chevron gasoline station owned by Solar

Oil Sussex at the time of the contamination. The groundwater contamination required residents of the Greenbrook Estates neighborhood to be connected to an outside water supply. Acting pursuant to the New Jersey Spill Compensation and Control Act, DEP directed Kimber Petroleum and Solar Oil to pay $2.16 million to fund the construction of an alternate water supply, failing which each would be subjected to treble damages. Kimber Petroleum and Solar Oil resisted payment of these costs, appealed to the Appellate Division, and moved for a stay of DEP's order exacting costs and imposing treble damages upon a refusal to pay. On July 31, 1986, the Appellate Division denied the motion for a stay pending appeal. On October 20, 1986, the Court certified the appeal pursuant to *Rule* 2:12–2 and ordered appellants to pay or to post security for the claimed costs of the removal but enjoined the imposition of treble damages.

I.

Kimber Petroleum and Solar Oil challenge the constitutionality of the New Jersey Spill Compensation and Control Act (the Spill Act), *N.J.S.A.* 58:10–23.11 to –23.11z. In particular, they assert that the Spill Act's treble damages provision violates the parties' due process rights under the federal and state constitutions.

The treble damages section of the Spill Act is as follows:

> Whenever any hazardous substance is discharged, the [Department of Environmental Protection] may, in its discretion act to remove or arrange for the removal of such discharge or may direct the discharger to remove, or arrange for the removal of, such discharge.... Any discharger who fails to comply with such a directive shall be liable to the department in an amount equal to three times the cost of such removal ... [*N.J.S.A.* 58:10–23.11f(a).]

Appendix A

The following section deals with the polluter's liability:

> Any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance which the department has removed or is removing ... shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs.
>
> An act or omission caused solely by war, sabotage, or God, or a combination thereof, shall be the only defenses which may be raised by any owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this act. [*N.J.S.A.* 58:10–23.11g(c), (d).]

Thus under these provisions a "discharger" is one who has "discharged a hazardous substance or is in any way responsible" for such a discharge. *Id.* The liability of a discharger is absolute—it is strict, "without regard to fault", and joint and several; only limited defenses not associated with fault—*i.e.*, relating to war, sabotage or divine factors—are available. *Id. See State, Dep't of Envtl. Protection v. Ventron Corp.*, 94 *N.J.* 473, 501–03 (1983) (liability under the Spill Act extends to parent corporation of wholly owned subsidiary that violated the Spill Act).

II.

[1] At the outset we point out that DEP, in issuing the directives in this case, has not been acting within the language of the Spill Act as strictly interpreted. The Act directly authorizes DEP to take one of two alternative actions when it discovers illegally-dumped hazardous waste: 1) it can act to remove the waste (and then bring a cost-recovery action against the responsible parties, *N.J.S.A.* 58:10–23.11q), or 2) it can direct a responsible party to remove the waste. *N.J.S.A.* 58:10–23.11g(c), (d). In this case, DEP has done neither. DEP's directive to Kimber Petroleum and Solar Oil required Kimber Petroleum to pay the money necessary for the work DEP intended to undertake in the construction of an alternative

water supply required by the local groundwater contamination. DEP did not seek relief by way of a cost-recovery action nor did it direct Kimber Petroleum and Solar Oil to do the work. This raises as a threshold question the validity of DEP's action in this case as a basis for treble damages. Though this issue was not fully raised by the parties, we believe it appropriate to deal with it at this time.

DEP's practice of requiring payment by responsible parties while maintaining control itself over remedial actions is not directly authorized by the Spill Act.[1] Nevertheless, DEP's ability directly to undertake removal of a discharge, thereby assuring the elimination of toxic contamination while concomitantly securing removal costs from responsible parties, would appear to be highly necessary as a means of effective enforcement of the Spill Act. DEP has the discretion, implicit in its broad implied powers, to require responsible polluters to pay for cleanup or removal costs prior to remedial action.[2] *See New*

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[1]Under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 *U.S.C.* §§ 9601 to 9657, the Environmental Protection Agency (EPA) has three options: 1) it may file a civil suit to force a responsible party to remove the hazardous waste, *id.* at § 9606(a); 2) it may issue an administrative order requiring removal; *id.*, and 3) it can use Superfund moneys for the cleanup, and the responsible parties would then be liable for those amounts to the Superfund. *Id.* at §§ 9604(a)(1), 9612(c)(1); *see Wagner Elec. Corp. v. Thomas*, 612 *F.Supp.* 736, 738 (D.C.Kan.1985). The EPA thus does not seem to be authorized by CERCLA to act in a way analogous to the way that DEP has acted in this case: *i.e.*, to maintain control of the cleanup operations while requiring the responsible parties to prepay.

[2]However, we note that if the DEP completed the cleanup and removal and then assessed costs, the accuracy of DEP's assessment of the costs would not be the issue it predictably is when a directive is issued to an alleged polluter before the cleanup has begun.

Jersey Guild of Hearing Aid Dispensers v. Long, 75 *N.J.* 544 (1978); *cf. GATX Terminals Corp. v. State, Dep't of Envtl. Protection*, 86 *N.J.* 46, 52 (1981) (statutory power to clean up spills provides basis to prevent spills). We are satisfied that the practice is implicit in the broad authority granted the Department under the Spill Act and under the Department's own authorizing legislation, *N.J.S.A.* 13:1D–1 to –19.

III.

The United States Supreme Court has upheld the validity under the federal constitution of multiple damages provisions. *Overnight Motor Transp. Co. v. Missel*, 316 *U.S.* 572, 584, 62 *S.Ct.* 1216, 1223, 86 *L.Ed.* 1682, 1691 (1942); *Missouri Pac. Ry. Co. v. Tucker*, 230 *U.S.* 340, 348–49, 33 *S.Ct.* 961, 962–63, 57 *L.Ed.* 1507, 1510 (1913); *Missouri Pac. Ry. Co. v. Humes*, 115 *U.S.* 512, 523, 6 *S.Ct.* 110, 114, 29 *L.Ed.* 463, 466 (1885). The Supreme Court regularly applies antitrust legislation, which, like the Spill Act, combines treble damages with joint and several liability. *See, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 *U.S.* 630, 101 *S.Ct.* 2061, 68 *L.Ed.*2d 500 (1981); *Cantor v. Detroit Edison Co.*, 428 *U.S.* 579, 96 *S.Ct.* 3110, 49 *L.Ed.*2d 1141 (1976). The Sherman Antitrust Act has been interpreted in a way that those subjected to onerous joint and several liability provisions have no right of contribution. *Texas Indus., supra.*

The plaintiffs do not, however, claim that the Spill Act's treble damages provision, as such, is invalid.[3] Instead they

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[3]A number of other New Jersey statutes authorize the recovery of treble damages. *See, e.g., N.J.S.A.* 2A:18–61.6 (fraudulent eviction), 2A:33–2 (impounding distressed chattels), 17:33A–7 (insurance fraud), 46:10A–2 (mortgage financing), 56:4–2 (unfair competition).

point to the fact that this provision is only triggered when a DEP order is disputed and claim that this is unconstitutional because it serves to deter judicial challenge to state action.

In *Ex parte Young*, 209 *U.S.* 123, 28 *S.Ct.* 441, 52 *L.Ed.* 714 (1908), the Supreme Court invalidated state rate-making legislation because the legislation permitted railroads to obtain judicial review of rates only as defendants in criminal prosecutions. The legislation violated due process because "the penalties for disobedience [were] by fines so enormous and imprisonment so severe as to intimidate [affected parties] from resorting to the courts to test the validity of the legislation." *Id.* at 147, 28 *S.Ct.* at 448, 52 *L.Ed.* at 724. With this type of legislation, "the result is the same as if the law in terms prohibited the [affected party] from seeking judicial construction of laws which deeply affect its rights." *Id.* If a challenging party has reasonable grounds for contesting the validity or applicability of an administrative order, it must be able to do so without penalty. *See Ex parte Young, supra*; *Oklahoma Operating Co. v. Love*, 252 *U.S.* 331, 338, 40 *S.Ct.* 338, 340, 64 *L.Ed.* 596, 599 (1920) (issuing permanent injunction restraining enforcement of penalties accruing during litigation "provided that the plaintiffs had reasonable ground to contest them"); *Reisman v. Caplin*, 375 *U.S.* 440, 84 *S.Ct.* 508, 11 *L.Ed.*2d 459 (1964).

The federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 *U.S.C.* §§ 9601 to 9657, has a provision similar to, but not identical with, the Spill Act's treble damages provision. 42 *U.S.C.* § 9607(c)(3) states:

> If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 104 or 106 of this Act,

> such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action.

The main difference between the language in the Spill Act and that of CERCLA is the former's mandatory tone. *Compare N.J.S.A.* 58:10–23.11f(a) ("Any discharger who fails to comply ... *shall* be liable ... in an amount equal to three times the cost of such removal.") (emphasis added) *with* 42 *U.S.C.* § 9607(c)(3) ("If any person ... fails *without sufficient cause*", etc.) (emphasis added).

CERCLA's treble damages provision has been challenged on the same ground as the Spill Act's treble damages provision is today challenged, as an allegedly unconstitutional infringement of federal due process rights. The federal courts that have addressed this claim have ruled that CERCLA's provision is constitutional. They have done so in part by interpreting the phrase "without sufficient cause" to authorize a "good faith defense": a party will not be liable for treble damages if it has a reasonable good faith belief that it has a valid defense to the remedial order. *Solid State Circuits, Inc. v. United States*, 812 *F.*2d 383 (8th Cir.1987); *Wagner Seed Co. v. Daggett*, 800 *F.*2d 310 (2nd Cir.1986); *Aminoil, Inc. v. United States*, 646 *F.Supp.* 294 (C.D.Calif.1986); *Wagner Elec. Corp. v. Thomas*, 612 *F.Supp.* 736 (D.Kan.1985); *United States v. Reilly Tar & Chem. Corp.*, 606 *F.Supp.* 412 (D.Minn.1985). Under a good-faith exception, treble damages cannot be imposed on a non-complying party "if the party opposing such damages had an objective reasonable basis for believing that the EPA's order was either invalid or inapplicable to it." *Solid State Circuits, supra*, 812 *F.*2d at 391 (footnote omitted).

The State purports to sidestep these constitutional claims by arguing that the directives that apparently impose potential liability for treble damages are actually merely notice of obligations under the Spill Act. It characterizes the treble damages provision as a mandatory, not a conditional, multiple damages provision. It argues that the directives do not possess independent legal force, *i.e.*, they do not as such prescribe liability for treble damages, but serve only to provide notice to potentially responsible parties of their obligations under the Spill Act. The directive, according to the State, simply gives the polluter the opportunity to clean up any dump sites for which it is responsible, thus serving only as a notice and as a basis for a defense to the imposition of treble damages liability: if the notice is not sent, liability cannot be imposed. The State contends that since the Legislature has the power to impose unconditional mandatory treble liability, it surely has the power to impose contingent treble damages, which benefits the alleged discharger—the ability to avoid "mandatory" multiple damages for the cleanup through compliance with the terms of the directive.

The State's characterization of the treble damages provision avoids reality. *N.J.S.A.* 58:10–23.11f(a) states that the only choice a company has when faced with a DEP directive is compliance or treble damages. Unlike most other laws with multiple damage provisions, the Spill Act's treble damages provision does not merely notify persons of potential liability and inform those persons how they may stay clear of illegal behavior. These provisions are indisputably coercive; they have the purpose and the effect of compelling persons to pay money to the State, even if those persons have a valid claim that they are not justly or legally responsible for the payment.

No exception is made for those who refuse compliance in order first to determine the directive's validity. However, the DEP argued that even though a charged party cannot avoid compliance with the required payment of costs, there are means available for bringing a challenge to the validity of a DEP directive without risking further penalties. The alleged violator can pay the costs assessed in the directive and then seek reimbursement from the Spill Fund. Such hearings would be before boards of arbitration with appeals to the Appellate Division.

> Boards of arbitration shall be convened by the administrator when persons alleged to have caused the discharge, the administrator or other persons contest the validity or amount of damage claims or cleanup and removal costs presented to the fund for payment. If the source of discharge is not known, any person may contest such claims presented for payment to the fund.
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> One board of arbitration may be convened to hear and determine all claims arising from or related to a common discharge.
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> The boards shall have the power to order testimony under oath and may subpoena attendance and testimony of witnesses and the production of such documentary materials pertinent to the issues presented to the board for determination. Each person appearing before the board shall have the right to counsel.
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> Determinations made by the board shall be final. Any action for judicial review shall be filed in the Appellate Division of the Superior Court within 30 days of the filing of the decision by the administrator. [*N.J.S.A.* 58:10–23.-11n(a), (c), (d), (g).]

[2] The Supreme Court has held that it is sufficient for the due process guarantee of the federal constitution that there be

some forum where an order's validity can be challenged without penalty; it need not be the same forum where enforcement actions are prosecuted and the challenge need not be pre-payment. *Yakus v. United States*, 321 *U.S.* 414, 64 *S.Ct.* 660, 88 *L.Ed.* 834 (1944). Under this analysis, the pre-adjudication payment of actual costs under the statute with the opportunity later to contest the legality or reasonableness of such costs without further penalty [4] could be viewed as satisfying essential due process concerns.

Nevertheless, under the circumstances, there remain doubts as to the Act's validity under the federal constitution because of the way in which it combines the lack of a pre-enforcement hearing with strict liability and added penalty for noncompliance.

The United States Supreme Court has never before ruled on the constitutionality of a statutory enforcement scheme that combined, as the Spill Act does, joint and several liability, nearly absolute liability, the virtual elimination of substantive defenses, mandatory treble damages, and no pre-enforcement hearing. In *Woodland Private Study Group v. State of N.J.*, 616 *F.Supp.* 794 (D.N.J.1985), the validity of such a scheme, in the context of the Spill Act, was examined by a federal district

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[4]Kimber Petroleum and Solar Oil argue that arbitration is an inadequate alternative forum for challenging the validity of DEP's Directives because only the amount of costs can be challenged in that forum. We do not agree with the implied narrow reading of *N.J.S.A.* 58:10–23.11n. The scope of the arbitrator's powers under that section is clearly broad enough to cover and challenge brought to the validity of any aspect of a directive. However, the DEP maintains that no recourse to the fund or its arbitration procedures may be had by a partially responsible discharger. Thus the remedy is illusory in almost all cases.

court and found to satisfy due process requirements.[5] The court's analysis in that case, however, failed to fully focus on the significance of the fact that the Act's provision of a means to challenge administrative action is *only* free of the threat of added punitive damages if done *after* compliance with such action.

Due process standards arguably call for a right to challenge the validity of a legislative or administrative order without facing the possibility that one will incur a greater penalty if such challenge is unsuccessful than the loss resulting from such an order if left unchallenged. *See United States v. Pacific Coast European Conference*, 451 *F.*2d 712, 717 (9th Cir.1971) (under due process a "constitutional tolling principle" prevents one from being forced to pay a statutory penalty for noncompliance with an act during the time it is being tested in good faith); *cf. Brown & Williamson Tobacco Corp. v. Engman*, 527 *F.*2d 1115, 1119 (2nd Cir.1975) ("one has a due process right to contest the *validity* of a legislative or administrative order ... without necessarily having to face ruinous

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[5]The *Woodland* court based its determination on its conclusion that the Act's post-enforcement arbitration provision satisfied the needs of parties claiming innocence of any wrongdoing. Some question arises, however, as to the adequacy of this provision for parties admitting responsibility but contesting the amount of money determined by the DEP as being required. One reading of the Act would find arbitration unavailable, at least to the extent of any contested amounts, in such a situation. *See Tree Realty, Inc. v. Department of Treasury*, 205 *N.J.Super.* 346, 349 (App.Div.1985) (any party in any way responsible for an offending discharge is fully liable and "there is no point in submitting the matter to arbitration."). Such a problem would not arise, however, if a good-cause defense was read into the Act.

penalties if the suit is lost."). While none of the individual components of the Spill Act enforcement framework violates due process requirements the combined weight of the joint and several strict liability scheme with the lack of a pre-enforcement hearing opportunity and the imposition of punishment in the form of treble damages upon failure to comply—even if such failure is predicated upon a reasonable defense—may be beyond constitutional tolerance.

The parties have questioned the Spill Act's validity under the New Jersey Constitution and the state doctrine of fundamental fairness.[6] The New Jersey Constitution offers protections that go beyond those offered by the United States Constitution. *See State v. Novembrino*, 105 *N.J.* 95 (1987); *State v. Hunt*, 91 *N.J.* 338 (1982); *State v. Alston*, 88 *N.J.* 211 (1981). We have resorted to the state constitution when there was uncertainty as to the protection afforded by the federal constitution. *See, e.g., State v. Williams*, 93 *N.J.* 39 (1983); *State v. Schmid*, 84 *N.J.* 535 (1980), appeal dismissed *sub nom. Princeton Univ. v. Schmid*, 455 *U.S.* 100, 102 *S.Ct.* 867, 70 *L.Ed.*2d 855 (1982). In a variety of contexts we have concluded that, compared with the federal constitution, the state constitution affords parallel protections, *e.g., State v. Gilmore*, 103 *N.J.* 508 (1986); *State v. Saunders*, 75 *N.J.* 200 (1977), or greater protections, *e.g., State v. Novembrino, supra; State v. Alston, supra.* In addition,

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[6]*Cf. Pennzoil v. Texaco*, — *U.S.* —, — — — & nn. 10–11, 107 *S.Ct.* 1519, 1526–27 & nn. 10–11, 95 *L.Ed.*2d 1, 16–17 & nn. 10–11 (1987) (federal court should abstain from determining validity of state statute under the federal constitution in part to give the state courts an opportunity to modify the statute's interpretation in light of a state constitutional provision).

the doctrine of fundamental fairness, which has roots in the New Jersey Constitution and in New Jersey common law, has been applied to grant persons procedural protections that may exceed those offered by the due process clause of the federal constitution. *See, e.g., State v. Abbati*, 99 *N.J.* 418 (1985); *State v. Gaffey*, 92 *N.J.* 374 (1983); *State v. Tropea*, 78 *N.J.* 309 (1978); *State v. Talbot*, 71 *N.J.* 160 (1976); *State v. Gregory*, 66 *N.J.* 510 (1975); *State v. Kunz*, 55 *N.J.* 128 (1969). *See generally State v. Ramseur*, 106 *N.J.* 123, 376–79 (1987) (Handler, J., dissenting) (discussing fundamental fairness protections against arbitrary governmental actions). We have recognized the relevance of independent state constitutional protections and the doctrine of fundamental fairness for the protection of civil rights and interests. *See State v. 1979 Pontiac Trans Am, Color Grey*, 98 *N.J.* 474 (1985); *Right to Choose v. Byrne*, 91 *N.J.* 287 (1982); *Burlington County NAACP v. Mt. Laurel*, 67 *N.J.* 151 (1975); *cf. Cunningham v. Department of Civil Serv.*, 69 *N.J.* 13 (1975) (as a matter of fundamental fairness and administrative due process demoted civil service employees held entitled to an evidentiary hearing to resolve a contested factual issue); *King v. South Jersey Nat'l Bank*, 66 *N.J.* 161, 191–98 (1974) (Pashman, J., dissenting) (state constitution's guarantee of due process should be held to void a contract's acceleration clause).

The Spill Act, as the State would have it interpreted and applied, could have a draconian impact on affected parties. A small company with arguably little or no actual responsibility for the discharge of a hazardous substance might be forced to pay a large amount of money, with no effective pre-payment judicial recourse, no means to challenge the DEP's estimate of

the monetary amount needed, and a potentially long delay before it gets its refund from the Spill Fund or the contribution due from the other liable dischargers. The result in fact could be confiscatory. This kind of problem—undue harshness in the individual application of the Act's enforcement provisions—can be rectified by recognition of the availability of a good-cause exception. The availability of such an exception would allow a genuinely aggrieved party with legitimate defenses to urge these in order to avoid the imposition of heavy penalties. Provisions for such an exception could be achieved through the minimal modification of the literal terms of the Act by implying an exception similar to that found in CERCLA. *See supra* at 76. Without an implied good cause, or reasonable cause exception, the statute may infringe the state or federal constitutions.

[3, 4] The question thus presented is whether the implication of such a good cause exception can be reconciled with the intent of the Legislature. Given the choice between invalidating the Spill Act and reading a provision into the Act, we choose the latter course. "In appropriate cases, a court has the power to engage in 'judicial surgery' or the narrow construction of a statute to free it from constitutional doubt or defect." *N.J. Chamber of Commerce v. N.J. Elec. Law Enforcement Comm'n*, 82 *N.J.* 57, 75 (1980); *see Town Tobacconist v. Kimmelman*, 94 *N.J.* 85, 104 (1983). This action is appropriate when the Legislature would have preferred the statute to remain in effect in modified form to the statute being invalidated. *Id.* We therefore hold that treble damages need not be assessed if the party opposing such damages had an objectively reasonable basis for believing that DEP's directive was either

invalid or inapplicable to it, and that any decision by the DEP to seek treble damages in a recovery action be subject to judicial review as any other agency action. We find that such limitation comports with what we perceive to be the intent of the Legislature. When viewed in the context of the broadened implied powers granted the DEP under our analysis, the scheme effectuates the legislative intent of providing a powerful anti-pollution mechanism, serving to discourage potentially liable parties without needlessly acting against potentially innocent parties with undue harshness. The imputation of a narrowly drawn good-cause defense is a reasonable constraint on the broad implied agency powers we find by our expansion of the literal terms of the Spill Act.

[5] We are satisfied that so interpreted, the Act will not be significantly weakened and that responsible polluters will remain fully amenable to the necessarily strict enforcement machinery of the Act. The Spill Act serves the important interests of preventing and eliminating contamination from toxic waste dumps.[7] The authorization of a good-cause defense to the Act's treble damages provisions will validate the Act's enforcement mechanisms. The Act so construed does not mean that compliance with DEP directives will be slowed because some parties challenge the directives in court. This would misstate the procedural posture in which a good-cause defense comes into play. A good-cause defense is relevant only once a company refuses to comply with a DEP directive and DEP moves in

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[7]The need for action in this area; and, in particular, for state government action, was shown by a recent report that state[d] [t]hat nationally there are tens

(Con't)

court to enforce the directive. In accordance with its directive the DEP in its enforcement action may seek treble damages as a penalty for non-compliance.[8] If the court determines that a company's basis for non-compliance is objectively reasonable, even if the court does not ultimately uphold the company's argument, DEP's request for treble damages may be rejected if not reasonable in light of all the circumstances. The enforcement provisions of the Act will remain effective tools to secure swift compliance with the terms of the Act to the end that hazardous discharges are cleaned up as promptly as possible by those polluters responsible. Given the importance of the objectives the Spill Act serves, the Legislature would prefer somewhat less efficient, but still effective, enforcement-provisions to none at all.

We turn more specifically to the additional issues of what kind of good-cause defenses would be available in a treble damages/enforcement action. This calls for an examination of the substantive liability of parties for removal under the Act and the nature and extent of damages available.

[6] A party even remotely responsible for causing contamination will be deemed a responsible party under the Act. *See*

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of thousands of abandoned toxic waste dumps, of which around 20,000 are seriously contaminated. By contrast, in the seven years that the federal statute CERCLA has been in place to protect the public from such contamination, only 13 sites have been completely cleaned up. New York Times, April 19, 1987, at E4, col. 1.

[8]In addition, the DEP has the option of itemizing the amounts required by its directives in order to limit the extent of what can be reached by a good-cause defense.

Ventron Corp., supra. As dischargers, Kimber Petroleum and Solar Oil are each responsible parties regarding the contamination that made the local water supply unusable. *N.J.S.A.* 58:10–23.11g(c) states that responsible parties are liable for "all cleanup and removal costs." Thus each is liable under the Spill Act for the total costs entailed in the cleanup and removal of the contaminants.

[7] Since the Act provides for joint and several liability DEP's assessment of one's proportional share of liability will rarely be the subject of a good-cause defense. In addition, the Act's strict liability provision will severely restrict claims involving the initial triggering of liability. Nevertheless, there remains a number of possible good-cause defenses. Kimber Petroleum and Solar Oil, for example, raise several arguments against the validity of the statutory damages scheme. One claim is that the costs sought are unreasonable; it is asserted that the work to construct a new water supply is beyond the statutory liability of a responsible party, which is limited to, at most, the cleanup and removal of the hazardous waste discharge. The meaning of the statute on this point is not clear. *N.J.S.A.* 58:10–23.11g(a)(2) defines "all cleanup and removal costs" to include "the cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge." Funding the creation of an alternative water supply might also fit under the equally broad definition, *id.* at (a)(1), that cleanup and removal costs include damage to private property. Thus it is arguable that a discharger would be responsible for creating an alternative long-term water supply. On the other hand, the construction of the extensive infrastructure entailed in a water supply may not be within the contemplation of replacing a natural resource destroyed by a dis-

charge. Moreover, genuine disputes may arise in terms of whether the previous water supply was wholly a part of a "natural resource" and whether a discharge brought about the destruction of the natural resource, as well as in terms of the costs reasonably related to any replacement of the natural resource.

[8] While the statute then can be read broadly to encompass such far ranging costs as being included in "removal costs", we acknowledge a countervailing position that such costs exceed those reasonably within the contemplation of the statute. We cannot on the record presented and the issues actually argued resolve these questions of statutory construction. We raise them to suggest that in an appropriate case, an aggrieved party should have the right, in an action for reimbursement to recover costs, to demonstrate that an element of the costs imposed by DEP is unreasonable. An identical contention raised on an objectively reasonable basis could constitute a "good-cause defense" to a pre-payment enforcement directive.

IV.

We conclude that (1) a good-cause defense by necessary implication is provided under the treble damages provision of the Spill Act, (2) good-cause defenses include challenges to the reasonableness of the costs assessed, and (3) the DEP has the authority to seek removal costs from dischargers while controlling remedial action and obtain treble damages upon failure to pay such costs.

Accordingly, we rule that the DEP directive issued to Kimber Petroleum and Solar Oil threatening treble damages upon noncompliance complies with the Spill Act. The provisions of the

DEP directive ordering the payment of removal costs are valid and enforceable subject, however, to any good-cause defense that may be raised by the appellants. Nevertheless, in this case we need not consider further the applicability of a good-cause defense as a basis for denying treble damages because the Court has ordered the parties to pay the remedial costs assessed by the directive or security for those costs and has for purposes of this appeal excused liability for treble damages based upon the earlier failure of the parties to have complied with the DEP directive. The directive of DEP, as modified by the order of this Court on appeal, is affirmed.

WILENTZ, C.J., dissenting.

The Court's decision today very substantially expands the power of the State, through the Department of Environmental Protection (DEP), to remedy the adverse effects of discharges of hazardous substances. In attempting to address the grave risks that hazardous substances pose to our society, the statute provides that the DEP may require a polluter to clean up and remove a hazardous discharge and its effects. Today the Court correctly finds that the DEP may alternatively require the polluter to pay on demand the estimated cost of such cleanup, leaving it to the Department to complete the task. Whereas the former is provided expressly in the statute, the latter power is found to exist by implication. This is a most important, indeed, a necessary, expansion of the Department's vital role in this area.

It is therefore ironic that in this same decision the Court provides polluters with a defense found nowhere in the Act. This defense allows a polluter to escape treble damages for

refusal to comply with a DEP demand for cleanup and removal money whenever the polluter's refusal to pay was based on "good cause." The Court thereby holds that despite the Act's explicit and unqualified requirement for cleanup on demand (or, alternatively, for payment on demand), the polluter who refuses to pay may successfully avoid liability for treble damages—the weapon designed by the Legislature to assure that cleanup funds would immediately be made available by polluters. If the polluter is found to have had "good cause" to refuse such payment, no treble damages are imposed *even though the polluter was, in fact and in law, liable for such payment.*

I dissent from that holding. Not only does the statute not provide for a "good cause" exception—on this there is no dispute—but furthermore the fair intent of the law is completely inconsistent with any such exception. The Constitution does not compel today's decision, which, contrary to the majority's assertions, will seriously erode the effectiveness of this law.

I.

The magnitude of our state's hazardous waste problem is beyond dispute. New Jersey produces 12.5% of the United States' chemical output, making the state the second largest chemical producer in the nation; 970 chemical plants are located in this state. Chemical Industry Council of New Jersey, Press Release (Trenton, N.J., n.d.). Moreover, chemicals produced out of state are transported along the northeast corridor via New Jersey's highways and railways, where accidents can lead to their release into this state's environment. The risks are aggravated by geologic, hydrologic, and soil conditions that make New Jersey's water supply peculiarly vulnerable to con-

tamination. Of the fifty states, New Jersey is thought to have the most severe hazardous waste problem. Morris, "Hazardous Wastes in New Jersey," 38 *Rutgers L. Rev.* 623, 624–26 (1986); *see also* New Jersey Department of Environmental Protections, *Status Report on the Hazardous Waste Management Program in New Jersey*, Vol. II at 19 (Oct. 1986) (New Jersey leads the nation in the number of hazardous waste sites identified by the Federal Superfund program with 97 of the 888 designated as of 1986); English, "Hazardous Waste Regulation: A Prescription for Clean Water," 13 *Seton Hall L. Rev.* 229, 230–31 n. 11 (1983) (by producing approximately 350,000 tons of hazardous waste per year, New Jersey surpasses all other states in the generation of hazardous waste).

The Legislature's decision to use unconventional remedies in the Spill Compensation and Control Act ("the Act" or the "Spill Act"), *N.J.S.A.* 58:10–23.11 to –23.11z, was based on a valid perception that this state faces an enormous environmental problem and that a great deal of money will be required to address it. The Legislature sought to require "the prompt containment and removal of ... pollution and substances." *N.J.S.A.* 58:10–23.11a. To help defray the costs, the Legislature created a fund by taxing those in the petrochemical industry. The Fund is available to pay damages promptly to victims of pollution and to finance cleanup and removal efforts. The Act states that

> [w]henever the department acts to remove a discharge or contracts to secure prospective removal services, it is authorized to draw upon the money available in the fund. Such money shall be used to pay promptly for all cleanup costs incurred by the department in removing or in minimizing damage caused by such discharge. [*N.J.S.A.* 58:10–23.11f(a).]

Thereafter, the Fund seeks reimbursement from those responsible for the pollution.

A critical attribute of the law, then, is that it creates an immediately available source of funds to clean up discharges of hazardous materials. The conventional approach—a suit by the DEP to establish liability, a judgment requiring the defendant to clean up or to pay for the cleanup, and ultimately further orders to compel compliance (including orders holding defendant in contempt, setting a date for compliance, extending the date, and so on)—was deemed inadequate for the solution of the problem. The Legislature mandated the expeditious cleanup and removal of hazardous wastes because this problem is not static, but constantly growing. The need was for relief from pollution, not for judgments and orders that, although perhaps vindicating individual rights, would leave pollution removal to the remote and uncertain future. The Legislature concluded that there was a need for immediate relief. The Fund is one means devised by the Legislature to achieve this result. Its purpose is to make sure that cleanup and removal come first—through the Fund—with litigation, if any, to follow.

Despite its size, the Fund does not begin to meet New Jersey's cleanup needs. The problem of remedying both today's new spills and the consequences of past pollution far exceeds the limits of the Spill Fund.[1] It is obvious that more

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[1]The Act itself recognizes the Spill Fund's inadequacy. "*If and to the extent that he determines that funds are available*, the administrator shall approve and make payments for any cleanup and removal costs incurred by the Department for the removal of a hazardous substance...." *N.J.S.A.* 58:10-23.11f(c) (emphasis supplied). Shortages are also anticipated where the fund is used to pay damages. "In the event that the total awards for a specific occurrenc exceed the current balance of the Fund, the immediate award shall be paid on a prorated basis...." *N.J.S.A.* 58:10-23.11r.

resources are needed.

The Legislature decided that whatever else was needed would come not from the taxpayers but from the polluters themselves.[2] It allowed the DEP to obtain the money for cleanup and removal of hazardous substances by demanding payment from alleged polluters prior to any hearing. To discourage refusal to comply with a DEP demand for payment, the Act imposes treble damages on the party refusing initial payment if that party is ultimately found to have been liable. *N.J.S.A.* 58:10–23.11f(a). It is that part of the solution to this problem that today's decision weakens, perhaps severely.

The methods devised by the Legislature of assuring relatively rapid cleanup of these sites include imposition of almost absolute liability for cleanup and removal costs. "An act or omission caused solely by war, sabotage, or God, or a combination thereof, shall be the only defenses which may be raised by any owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this Act." *N.J.S.A.* 58:10–23.11g(d). Moreover, liability is "joint and several." Anyone "in any way responsible" for the discharge that ultimately poisons a site is liable for all cleanup and removal costs. *N.J.S.A.* 58:10–23.11g(c). In other words, a party, free of any negligence, who discharges hazardous materials on a particular site, is fully liable for all damages caused

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[2]Contributions from responsible parties figure prominently in this state's overall toxic cleanup scheme. According to a recent DEP report, "New Jersey expects approximately $500 million in contributions from private responsible parties to meet the total program goal of $1.6 billion." New Jersey Department of Environmental Protection, *New Jersey Hazardous Waste Management Program Update* 1 (March 1987).

by the contamination of that site and all cleanup costs even though the discharges of other parties may have been greater and may have involved negligence. The party deemed liable is left to seek contribution from other parties responsible for the contamination of the site.[3]

The majority expresses no objection to the Legislature's imposition of absolute liability and joint and several liability. It is the next step in the Legislature's attempt to remedy the problem that causes the Court to hesitate in executing this law as written by the Legislature. The legislation provides that one designated by the DEP as liable for these costs may be required on demand of the DEP—before any adjudication of such

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[3]In New Jersey we have, until recently, accepted without question the idea that joint tortfeasors—those whose actions together add up to the total damage—are "jointly and severally" liable for the damages caused. The severity of the common-law rule was such that one could not obtain contribution even from those whose culpable actions were the major cause of the problem. That injustice has been remedied to a great extent, *see N.J.S.A.* 2A:15–5.3, but there has been no general change in the law that holds each one of the joint tortfeasors liable for the entire damage, whether or not it is able to obtain contribution. The Legislature has recently placed certain limitations on the liability of joint tortfeasors, but these explicitly do not apply in environmental cases. *See L.*1987, *c.* 325, § 3 (to be codified at *N.J.S.A.* 2A:15–5.2) (joint tortfeasor in non-environmental case responsible for 20% or less of harm is liable only for attributable share of damages; party responsible for over 20% but less than 60%, though liable for full amount of economic damages, is liable only for attributable share of noneconomic damages); *see also* Licensed Alcoholic Beverage Server Fair Liability Act, *L.*1987, *c.* 152, § 6 (to be codified at *N.J.S.A.* 2A:22A–6) (alcohol beverage server determined to be a joint tortfeasor is "responsible for no more than that percentage share of the damages which is equal to the percentage of negligence attributable to the server"); *L.*1987, *c.* 404, § 5 (to be codified at *N.J.S.A.* 2A:15–5.5 *et seq.*) (similar limitation on liability of social hosts for alcohol-related a idents).

liability—to undertake the entire cleanup and removal task. Alternatively, as the Court today correctly holds, the party may be required to pay to the DEP, on its demand, an amount sufficient to enable the DEP (or its contractors) to effect the cleanup and removal itself. If, on demand for that sum, the designated party fails to pay, it is, should it ultimately be held liable, liable not only for the entire cost, but for three times that cost. *N.J.S.A.* 58:10–23.11f(a). The treble damages provision of the Act thus "provides strong incentives to private parties to participate in the hazardous waste cleanup process and to determine the extent of their liability after such participation has commenced." *Woodland Private Study Group v. New Jersey, Dep't of Envtl. Protection*, 616 *F.Supp.* 794, 811 (D.N.J.1985). The statute allows for the possibility that a party wrongly but honestly believing that it is not liable (or not liable for the amount demanded) will suffer punitive treble damages if it withholds payment based on that belief. It is this possibility that prompts the Court to modify the remedy.

The Court holds that treble damages are not recoverable if the responsible party's refusal to pay is based on "good cause" even when that party is, in fact, fully liable. "Good cause" is not fully described, but it appears to be an honest belief, grounded on objective fact, that the party is not liable or, if liable, is not liable for the amount claimed. As the majority says, "[i]f the court determines that a company's basis for noncompliance is objectively reasonable, even if the court does not ultimately uphold the company's argument, DEP's request for treble damages may be rejected if not reasonable in light of all the circumstances." *Ante* at 82. Precisely what this means is not clear. It may imply, in addition to a defense based on the objective reasonableness of a refusal to comply with the DEP's demand for funds, a further defense, in the action to

recover treble damages, that the DEP's request is "not reasonable in light of all the circumstances."

Before dealing with the legal analysis of the Court's limitation on this treble damage power, a summary of its practical effect is instructive. As written by the Legislature, this seemingly harsh provision might have promptly supplied the State with the wherewithal to meet its cleanup and removal goals. Those companies partly or fully responsible for creating hazardous waste sites would presumably have readily paid the amount demanded in order to avoid the risk of treble damages. Many of them are fully able to make such payments with only minimal impact on their operations. The State would be able to start and finish the cleanup. And the alleged polluter, if indeed it was not liable or was overcharged for the cost of the cleanup, would be entitled to reimbursement from the State through the Fund. The goal, immediate cleanup and removal, would have a chance of being achieved.

It is the importance of this goal that seems not to have had a sufficient impact on the Court's analysis. The threat of damage from these sites is severe and imminent. Failure to address the threat will be deleterious not only to industry and growth but to life itself. The goal of the challenged provision is to force polluters to pay prior to litigation so that the State can address the problem immediately.

Balanced against this goal, the Court posits the potential unfairness of the remedy. An uninsured small business, truly in doubt as to its liability, may be faced with a grim choice. It may pay, thereby placing the company in financial jeopardy notwithstanding the prospect of reimbursement, or, alternatively, it may refuse to pay and risk an ultimate treble damage sanction. If unfairness does result, the administrator of the

Fund has discretion to compromise a claim against a discharger that would otherwise be subject to the treble damage penalty because of its refusal to pay. It is noteworthy that in the companion case, *I.M.O. J.I.S. Industrial Service Company Landfill*, 110 *N.J.* 101 (1987), the DEP, after making a demand for payment (in that case to finance a design and feasibility study), thereby triggering potential treble damages, settled the matter apparently by agreeing to various contributions from numerous dischargers. In other words, the law does not require the enforcement agency to act unfairly. *See N.J.S.A.* 58:10–23.11q.

The Court underestimates the potential impact of its "good cause" exception to the treble damages remedy. Each discharger will seek to slip through the loophole created in this case. Whether it be the small business or the multinational corporation, management, in deciding whether to refuse to pay, will ask itself whether the circumstances might persuade a judge—or a jury—that the company's refusal was reasonable, or that treble damages were not "reasonable in light of all of the circumstances." See *ante* at 82.

The concept of "good cause" has performed a great service in the law, especially where narrow specifics in legislation or decisional law are not feasible. The virtue of "good cause"—its flexibility, its expansiveness, its ability to cover many different kinds of situations, difficult to define in advance—is in this situation a vice. Instead of the assured prompt flow of funds to the State from those who are responsible for polluting our environment, instead of the prompt cleanup and removal of hazardous substances, we will have delay and litigation leading to the compromises that have for so long afflicted governmental attempts to act effectively in this area.

This is an arena where desperately needed action has been dreadfully delayed. *IMO J.I.S. Indus. Serv. Co. Landfill*, *supra*, 110 *N.J.* 101, is but one example. After twenty years, the courts, the DEP, and the polluter are still arguing about a plan for cleanup. With today's judicially designed exception to liability, we can expect more of the same—delay reinforced by the predictable reluctance of judges and juries to impose treble damages on a polluter who shows some semblance of honesty and "good cause" in not putting up the money.

No balancing of societal interests—assuming this were a permissible concern of the Court—calls for such a result. By that balance the Court, in order to avoid the possibility of unfair application to a few, may be seriously impeding society's attempt to escape the certain substantial destruction caused by these poisonous sites. Our need for the swift action that the threat of treble damages would elicit dwarfs the unfairness that may result from the actual imposition of this remedy.

The Court has created the "good cause" exception not because the Act without it would be unconstitutional, but rather because the Act "may" be unconstitutional. *Ante* at 82. Noting that "none of the individual components of the Spill Act enforcement framework violates [federal] due process requirements," the Court concludes that the "combined weight" of its various elements "*may* be beyond constitutional tolerance." *Ante* at 79–82 (emphasis supplied). The Court moreover suggests that the Act may be invalid under the New Jersey Constitution and our State's "doctrine of fundamental fairness." *Ibid.* Never having decided that the statute does infringe state or federal constitutional rights, or our state's concept of fundamental fairness, the Court nevertheless con-

cludes that it is forced to "the choice between invalidating the Spill Act and reading a provision into the Act," *i.e.*, the "good cause" exception. *Ante* at 82. The Court has seriously weakened the statute in order to avoid a constitutional deficiency that it has never found and one that, in my opinion, does not exist.

It is difficult to meet the Court's constitutional argument, since the majority concedes that "it is sufficient for the due process guarantee of the federal Constitution that there be *some* forum where an order's validity can be challenged without penalty; it need not be the same forum where enforcement actions are prosecuted and the challenge need not be pre-payment." *Ante* at 79. Perhaps the strongest argument that the Court can muster to support its doubt about the constitutional validity of these provisions is its statement that "the United States Supreme Court has never before ruled on the constitutionality of a statutory enforcement scheme that combined, as the Spill Act does, joint and several liability, nearly absolute liability, the virtual elimination of substantive defenses, mandatory treble damages, and no pre-enforcement hearing." *Ante* at 79. Each of those, however, as the Court has pointed out, *ante* at 79–82, is constitutional; there is no payment and was indeed liable) is proof of the Legislature's intent.

The Court's analysis of the possible claims of Kimber and Solar in this case, *ante* at 85–86, indicates the myriad circumstances that this Court envisions as perhaps giving rise to "good cause" to refuse payment. The effect of this broad exception, then, will be to encourage a polluter to resist DEP demands for cleanup and removal funds. What will occur is a

full-blown trial involving complex questions of liability and quantum of damages that will likely take years to resolve. And that will be followed by appeals. One can predict that with the treble damage inducement thus drained of its strength, the State will be forced to look elsewhere for the needed financing to fund cleanups as spills occur. Meanwhile, continued delay will render cleanup and removal of hazardous substances increasingly difficult and expensive. By creating an exception where none was intended by the Legislature nor required by the Constitution, the Court has, I fear, significantly diminished the State's ability to deal effectively with a critical problem.

The Court effectively holds that unless a good cause defense is allowed the statute in its operation violates due process. *Ante* at 82. The Court notes, however, that treble damages could be assessed against polluters in a law that contained no demand-refusal triggering mechanism. *Ante* at 85–86. As the Court points out, "[t]he Supreme Court regularly applies antitrust legislation, which, like the Spill Act, combines treble damages with joint and several liability. The Sherman Antitrust Act has been interpreted in a way that those subjected to onerous joint and several liability provisions have no right of contribution." *Ante* at 86 (citations omitted). A demand-refusal triggering mechanism can, from that vantage point, be viewed as less onerous than the impact of antitrust legislation: not only does our substantive law allow a right of contribution from other tortfeasors, but treble damages can be escaped by paying the underlying liability on demand. The payment of more than was required, would have the right of reimbursement from the Fund. It strains credulity to infer that the Legislature intended, through its treble damage threat,

not only to obtain funds from a possible polluter but to prevent a party, on proof of its innocence, from recouping what it had been unjustly forced to pay the State.

The Court notes that "the DEP maintains that no recourse to the Fund or its arbitration procedures may be had by a partially responsible discharger," and concludes that "[t]hus the remedy is illusory in almost all cases." *Ante* at 79 n. 4. Obviously, no recourse to the Fund may be had by any "partially responsible discharger" if, under the law, that discharger is liable for the entire damage. It is difficult to understand how the statute is unconstitutional (or the remedy "illusory") in failing to provide reimbursement to a party that has paid all of the damages when that party is in fact liable for all of the damages. If the partially responsible discharger has been overcharged for the total cost of the cleanup, however, that discharger must have recourse against the Fund.

If this is the concern that leads the Court to question the constitutionality of the statute, its insubstantiality is apparent. It is eliminated by a construction of the statute that is not only reasonable but compelled.

Had the Legislature intended a "good cause" exception, or anything like it, it would have said so. It provided, in this very Act, that penalties for failure to pay the tax imposed by the Act might be remitted if such failure "was excusable under the circumstances," *N.J.S.A.* 58:10–23.11h(e); no similar excuse is provided for refusal to pay for cleanup costs, *see N.J.S.A.* 58:10–23.11g(d). Moreover, the Legislature was undoubtedly aware of the provision in the parallel federal statute triggering treble damages only where the polluter's failure to clean up was "without sufficient cause." 42 *U.S.C.* § 9607(c)(3). The fact that our Legislature saw fit to impose treble damages

without the slightest mention or hint that any excuse would suffice to avoid this sanction (if the party refused demand for Court nonetheless invalidates the statute, or more accurately, finds an implied "good cause" exception without which the statute "may" be unconstitutional. As the Court puts it, "[d]ue process standards *arguably* call for a right to challenge the validity of a legislative or administrative order without facing the possibility that one will incur a greater penalty if such challenge is unsuccessful than the loss resulting from such an order if left unchallenged." *Ante* at 79 (emphasis supplied).

It is widely recognized that the requirements of due process cannot be determined in the abstract, without regard to the concrete interests at stake in a given circumstance. *See Jamouneau v. Harner, supra*, 16 *N.J.* at 514 ("The basic right of private property perforce yields to an overriding public need."). In none of the due process cases cited by the Court was the state's interest as urgent and as weighty as it is here. Our state has found that in order to remove as quickly as possible the poisons that menace the public health and welfare, vast sums must immediately be made available to commence the effort. The only way such sums will be available is if polluters are forced to pay their fair share and to do so now. The Legislature has determined, and correctly so, that ordinary legal process is wholly inadequate for this purpose. Lawsuits to compel removal and cleanup, to recover damages on proof of liability, and to recover treble damages would all afford traditional due process, but would leave the state Fund without the means to satisfy its immediate need for funds from polluters.

The Legislature has concluded that the only remedy that will suffice is one that threatens severe sanctions against polluters who fail to pay immediately on demand. The process that is

due to targeted companies, the Legislature has concluded, is the right, *after such payment*, to sue to recover all or some of the payment if it is ultimately determined that the company involved either was not liable at all, or was liable for less than it paid. If the process that is due to such polluters requires more, requires that they be allowed not to pay in advance, but to contest their liability before payment, or to escape the treble damage sanction because of a reasonable belief as to their non-liability, the Legislature's goal will not be achieved, the money will not be forthcoming, the poison will not be removed. I do not believe that society is powerless to arrange for an immediate cleanup of these sites by forcing those who have caused the damage to pay for that cleanup up front. I do not believe that the only method by which the legislative goal of immediate cleanup can be achieved is through general taxation. That, unfortunately, is the result of today's decision.

I suggest that the Court goes wide of the mark in its conclusion that today's holding will cause little damage to the Legislature's effort to clean up hazardous waste sites immediately. Today's decision does not reckon with the unprecedented nature of the risk facing this state and its citizens. There is no room for judicial interference with this attempt at self-preservation. Only the clearest constitutional infirmity could justify today's result. I find none, and the Court finds, at most, that "maybe" such a defect exists. I would allow this statute to be enforced as written.

For affirmance as modified—Justices CLIFFORD, HANDLER, O'HERN, GARIBALDI and STEIN—5.

Dissenting—Chief Justice WILENTZ—1.

APPENDIX B — ORDER OF THE SUPREME COURT OF NEW JERSEY DATED MAY 24, 1988

SUPREME COURT OF NEW JERSEY
September Term 1987

M-1104/1105
26,116

IN THE MATTER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENAL PROTECTION ISSUED TO KIMBER PETROLEUM CORPORATION, SHELL OIL COMPANY AND SOLAR-OIL COMPANY.

(Kimber Petroleum Corporation)

This matter having been duly presented to the Court, it is ORDERED that the motions for reconsideration (M-1105) and for a stay of the judgment (M-1104 are denied, provided, however, that with the consent of the Attorney General, movant shall have 10 days from the filing date of this Order within which to comply with the judgment of the Court.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 24th day of May, 1988.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

APPENDIX C — ORDER OF THE SUPREME COURT OF NEW JERSEY DATED OCTOBER 20, 1986

SUPREME COURT OF NEW JERSEY
September Term 1986
M-4/22/23/24
A-127/128

IN THE MATTER OF THE DIRECTIVE OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION ISSUED TO KIMBER PETROLEUM CORPORATION, SHELL OIL COMPANY AND SOLAR OIL COMPANY.

ORDER ON MOTIONS AND
ORDER GRANTING CERTIFICATION

This matter having come before the Court on motions for Appellants Kimber Petroleum Corporation and Solar Oil Company for a stay pending appeal (M-4), supplementation of the record (M-22), acceleration (M-23), and leave to file an overlength brief (M-24), and the Appellants having previously applied for temporary emergency relief under Rule 2:9-8, including a stay of the determination of the New Jersey Department of Environmental Protection, Division of Waste Management (DEP) embodied in its Directive dated May 29, 1986, directing payment of $2,164,137.00 for work to be undertaken pursuant to the Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11 to -23.11z, and for an Order enjoining and restraining the DEP from seeking sanctions, penalties, or both, including treble damages, against Appellants during the pendency of this action, which relief was granted in part by a single-justice order dated July 31, 1986;

And the Court having considered the matter and good cause having been-shown;

It is ORDERED that the partial stay heretofore granted by the Order dated July 31, 1986, of paragraph 16 of the Department's Directive of May 29, 1986, which reads as follows:

Appendix C

NOW, THEREFORE, RESPONDENTS ARE HEREBY DIRECTED TO:

16. Arrange for the conduct of the work referenced in paragraph 15 by paying $2,164,137.00 to the Department to fund the costs of the work referenced in paragraph 14 within thirty (30) calendar days after receipt of this DIRECTIVE. Payment shall be made by certified check payable to the "Treasurer, State of New Jersey"

NOTICE

If Respondents fail to make the payment referenced in Paragraph 16 within thirty (30) calendar days after receipt of this DIRECTIVE, the Department will conduct the RI/FS of the Landfill site using public founds. In addition, should Respondents fail to make such payment, the Department will commence suit against the Respondents seeking damages and reimbursement for all costs incurred. Specifically, failure to comply with this DIRECTIVE will increase Respondents' liability to the Department in an amount equal to three (3) times the costs of conducting the RI/FS, pursuant to Section 7 of the Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11f.

is modified, in that the enforcement of the terms of paragraph 16 of said Directive is partially stayed to permit Appellants, within thirty (30) days from the filing date of this Order, either to make direct payment to fund costs as required by said paragraph 16,

or to furnish a satisfactory bond or other security conditioned upon the payment of said costs in the event the validity of said Directive is sustained on appeal; and, as a condition to compliance with the partial stay directing the payment of costs or posting security as aforesaid, it is further

ORDERED that the Department of Environmental Protection shall be and is hereby enjoined from seeking or imposing sanctions or penalties, including treble damages, based upon the failure or refusal of these appellants to pay the amounts set forth in Paragraph 16 of the Directive of May 29, 1986, pending the disposition of the within motion for a stay and pending the disposition of the appeal; and it is further

ORDERED that the motion to supplement the record (M-22) is hereby reserved, and that the motions for acceleration (M-23) and for leave to file an overlength brief in support of the motion (M-24) are hereby granted; and it is further

ORDERED that the within appeal pending in the Appellate Division is hereby certified directly to this Court to be heard together with *IMO the J.I.S. Industrial Service Company Landfill.*

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 20th day of October, 1986.

s/ Stephen W. Townsend
Clerk

APPENDIX D — ORDER OF JUSTICE CLIFFORD, SUPREME COURT OF NEW JERSEY DATED JULY 31, 1986

SUPREME COURT OF NEW JERSEY
September Term 1986

IN THE MATTER OF THE DIRECTIVE OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION ISSUED TO KIMBER PETROLEUM CORPORATION SHELL OIL COMPANY AND SOLAR OIL COMPANY.

ORDER

This matter having come before a single Justice on application of Budd, Larner, Gross, Picillo, Rosenbaum, Greenberg & Sade, P.C., attorneys for Appellant Kimber Petroleum Corporation, Edwin R. Matthews, Esq. appearing, and Farrell, Curtis, Carlin & Davidson, attorneys for Appellant Solar Oil Company, for temporary emergency relief under Rule 2:9-8 in the form of an Order staying the decision and/or action of the New Jersey Department of Environmental Protection, Division of Waste Management, embodied in its Directive dated May 29, 1986, directing payment of $2,164,137.00 for work to be undertaken pursuant to the Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11 to -23.11z, and for an Order enjoining and restraining the New Jersey Department of Environmental Protection, Division of Waste Management, from seeking sanctions and/or penalties, including treble damages, against Appellants during the pendency of this action, and for an Order, pursuant to Rule 2:5-5(b) to supplement the record on appeal by the taking of additional evidence and the making of findings of fact thereon by a judge of the Superior Court especially designated for that purpose, and for an Order accelerating the appeal,

Appendix D

And a single Justice having considered the papers filed in support of the application and arguments of counsel, and Ross A. Lewin, Deputy Attorney General, appearing on behalf of the New Jersey Department of Enviromental Protection in opposition thereto, and for other good cause shown;

It is on this 3lst day of July, 1986,

ORDERED that so much of the Directive of May 29th, 1986, as reads as follows:

> NOW, THEREFORE, RESPONDENTS ARE HEREBY DIRECTED TO:
>
> 16. Arrange for the conduct of the work referenced in paragraph 15 by paying $2,164,137.00 to the Department to fund the costs of the work referenced in paragraph 14 within thirty (30) calendar days after receipt of this DIRECTIVE. Payment shall be made by certified check payable to "Treasurer, State of New Jersey"

be and is hereby stayed as to these Appellants until September 4th, 1986, and until further Order of the Court, reserving for the full Court the issue whether the State will possess a cause of action for treble damages for expenditures made during the course of this stay; and it is

FURTHER ORDERED that the New Jersey Department of Environmental Protection, Division of Waste Management, be and hereby is enjoined and restrained from seeking sanctions and

or penalties including treble damages against Appellants for noncompliance with the Directive during the pendency of this stay.

s/ Robert L. Clifford
ROBERT L. CLIFFORD,
Associate Justice

APPENDIX E — ORDER OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DATED JULY 31, 1986

ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
MOTION NO.
BEFORE PART O

JUDGES SIMPSON
SHEBELL

IN THE MATTER OF THE DIRECTIVE OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION ISSUED TO KIMBER PETROLEUM CORPORATION, SHELL OIL COMPANY AND SOLAR-OIL COMPANY.

MOVING PAPERS FILED: JULY 17, 1986
ANSWERING PAPERS FILED: JULY 25, 1986
DATE SUBMITTED TO COURT: JULY 17, 1986
DATE ARGUED: JULY 17, 1986
DATE DECIDED: JULY 31, 1986

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION FOR STAY AND TO SUPPLEMENT ADMINISTRATIVE RECORD

GRANTED: _____
DENIED: xxxx
OTHER: _____

Appendix E

SUPPLEMENTAL:

FOR THE COURT:

s/ Thomas F. Shebell, Jr.
THOMAS F SHEBELL, JR., J.A.D.

WITNESS, THE HONORABLE THOMAS F. SHEBELL, JR. PRESIDING JUDGE OF PART 0 , SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 31st DAY OF JULY 1986.

s/ Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

APPENDIX F — ORDER OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DATED JULY 17, 1986

ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
MOTION NO.
BEFORE PART O

JUDGES SIMPSON
SHEBELL

IN THE MATTER OF THE DIRECTIVE OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION ISSUED TO KIMBER PETROLEUM CORPORATION, SHELL OIL COMPANY AND SOLAR-OIL COMPANY.

MOVING PAPERS FILED: JULY 17, 1986
ANSWERING PAPERS FILED:
DATE SUBMITTED TO COURT: JULY 17, 1986
DATE ARGUED: JULY 17, 1986
DATE DECIDED: JULY 17, 1986

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION FOR STAY AND TO SUPPLEMENT
ADMINISTRATIVE RECORD

GRANTED:_____
DENIED: _____
OTHER: xxx

Appendix F

SUPPLEMENTAL: TEMPORARY STAY PENDING FURTHER CONSIDERATION OF THE MOTION IS GRANTED UP TO AND INCLUDING JULY 31, 1986. THE GRANTING OF THIS STAY SHALL NOT IN ANY WAY AFFECT THE STATE'S RIGHT TO TREBLE DAMAGES WHICH IT MIGHT OTHERWISE BE FURTHER ENTITLED TO. THE STATE MAY FILE A REPLY TO THE MOTION ON OR BEFORE 4 P.M. JULY 25, 1986.

FOR THE COURT:

s/ Thomas F. Shebell, Jr.
THOMAS F. SHEBELL, JR. J.A.D.

WITNESS, THE HONORABLE THOMAS F. SHEBELL, JR. JUDGE OF PART 0, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS DAY OF JULY 1986.

s/ Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

APPENDIX G — STATE OF NEW JERSEY DEPARMENT OF ENVIRONMENTAL PROTECTION DIRECTIVE IN THE MATTER OF KIMBER PETROLEUM CORPORATION, SHELL OIL COMPANY, AND SOLAR OIL COMPANY, DATED MAY 29, 1986

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WASTE MANAGEMENT
CN 407 - Trenton, NJ 08625

DIRECTIVE

IN THE MATTER OF KIMBER PETROLEUM CORPORATION; SHELL OIL COMPANY; AND SOLAR-OIL COMPANY,

Respondents.

This DIRECTIVE is issued to the above-captioned Respondents pursuant to the authority vested in the Commissioner of the New Jersey Department of Environmental Protection (hereinafter "the Department" or "NJDEP') by N.J.S.A. 13:1D-1 *et seq.* and the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 *et seq.*, and duly delegated to the Assistant Director for Enforcement of the Division of Waste Management pursuant to N.J.S.A. 13:1B-4.

FINDINGS

1. The Kimber Petroleum Corporation, a New Jersey corporation, a successor to the Allen Oil Company, operates a gasoline station (the "Kimber Station") located at Block 220, Lots 2 and 9, on Lakeside Avenue in West Milford, New Jersey.

2. Shell Oil Company, a Delaware corporation, owned and operated a Shell gasoline station (the "Shell Station") located

at Block 276, Lots 17D and 19A, on Lakeside Avenue, in West Milford, New Jersey, until August of 1984.

3. The Solar Oil Company, a New Jersey corporation, owned and operated a gasoline station (the "Solar Station") located at Block 218, Lots 47 and 47A, on Lakeside Avenue, in West Milford, New Jersey, until 1983.

4. The above referenced gasoline stations are or were all located on three corners of the intersection of Lakeside Avenue, Union Valley Road and Greenwood Lake Turnpike in West Milford, New Jersey (hereinafter "the intersection").

5. During the course of investigations conducted by the Department and others between October 4, 1984 and April 22. 1986 a total of twelve (12) potable wells located in the vicinity of the intersection referenced in paragraph 4 were found to be contaminated with hazardous substances, benzene and petroleum hydrocarbons. This residential neighborhood is also known as the Stainsby Court area. It has also been determined that a large plume of ground water contaminated with hazardous substances, benzene and petroleum hydrocarbons, is migrating from the area of the intersection and threatens the potable water supply of several other homes in the Stainsby Court area, as well as the potable water supply of at least one hundred (100) homes in the Greenbrook Estates area of West Milford, which is located southwest of the intersection.

6. Based on the existence of the ground water contamination referenced above, the New Jersey Geological Survey has identified an area of West Milford in which no new potable water wells may be installed. This includes the Stainsby Court

area, the Woodland and Slater Roads area, and the Greenbrook Estates area.

7. During the course of the investigations referenced above, seven (7) monitoring wells were installed at the Kimber station. Analysis of samples taken from these wells indicate the presence of hazardous substances, petroleum hydrocarbons.

8. During the course of the investigations referenced above, four (4) monitoring wells were installed at the Solar station. Analysis of samples taken from the wells indicate the presence of hazardous substances, petroleum hydrocarbons.

9. During the course of the investigations referenced above, four (4) monitoring wells were installed at the Shell station. Analysis of samples taken from these wells indicate the presence of hazardous substances, petroleum hydrocarbons, in the ground water at this site.

10. The hazardous substances referenced above were discharged into the waters and onto the lands of the State of New Jersey and continue to discharge into the waters of the State in violation of Section 4 of the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11c.

11. The Kimber Petroleum Corporation, the Solar Oil Company, and the Shell Oil Company (hereinafter referred to as the "Respondents") are responsible for the discharge of hazardous substances.

12. Pursuant to N.J.S.A. 58:10-23.11g(c), the Respondents are strictly liable, jointly and severally, without regard to fault, for all costs of the cleanup and removal of the hazardous substances discharged.

Appendix G

13. Pursuant to N.J.S.A. 5:10-23.11(f), whenever any hazardous substance is discharged, the Department may, in its discretion, act to remove or arrange for the removal of such discharge, or may direct the discharger to remove or arrange for the removal of such discharge.

14. In order to provide those residences and commercial establishments whose domestic wells have been contaminated, with a safe, dependable supply of potable water; and in order to eliminate the threat posed to the water supply of certain other residences and commercial establishments, it is necessary to:

    a. Connect, by a transmission main with related appurtenances and valves, the Stainsby Court homes to the production wells in Greenbrook Estates. This will include distribution mains and homeowner connections with individual water meters.

    b. Develop a new supply source of at least 75 gpm capacity in an area outside of the zone of contamination as designated by New Jersey Geological Survey. This will include designing and constructing the appropriate test wells, treatment, drilling and outfitting no more than two supply wells, facilities, and well houses. A transmission line will carry the water to the service area. After this supply source is completed the Greenbrook production wells will be taken off-line and may be upgraded. A storage tank of 150,000 gallon capacity will be installed.

    c. Replace the current distribution system in Greenbrook Estates with appropriately sized water mains and related appurtenances and valves, and homeowner connections with individual water meters.

d. Connect Woodland and Slater Roads with distribution mains, related appurtenances and valves, and homeowner connections with individual water meters.

e. Seal all private wells in the designated project area.

15. The Department currently estimates that the cost of completing the work referenced in paragraph 14 is $2,164,137.

DIRECTIVE

NOW, THEREFORE, RESPONDENTS ARE HEREBY DIRECTED TO:

16. Arrange for the conduct of the work referenced in paragraph 15 by paying $2,164,137 to the Department to fund the costs of the work referenced in paragraph 14 within thirty (30) calendar days after receipt of this DIRECTIVE. Payment shall be made by certified check payable to "Treasurer, State of New Jersey".

NOTICE

If Respondents fail to make the payment referenced in paragraph 15 within thirty (30) calendar days after receipt of this DIRECTIVE, the Department will conduct the work referenced in paragraph 14 using public funds. In addition, should Respondents fail to make payment, the Department will commence suit against the Respondents seeking reimbursement for all costs incurred. Further, failure to comply with this DIRECTIVE will increase Respondents' liability to the Department in an amount equal to three (3) times the cost of conducting the work referenced in paragraph 14, and will cause a claim and lien to be placed

upon all of the Respondents real and personal property pursuant to section 7 of the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11(f), including a first priority claim and lien on the property subject to the cleanup and removal.

RESERVATION OF RIGHTS

In the event that the costs of conducting the work referenced in paragraph 14 exceed the estimate specified above, the Department reserves the right to direct the Respondents to pay such additional costs and to seek full reimbursement and treble damages for all such additional costs if Respondents fail to pay same. In addition, the Department reserves the right to direct Respondents to take, or arrange for the taking of any and all additional remedial actions which the Deparment determines to be necessary to protect public health and safety or the environment, and to seek full reimbursement and treble damages for all costs incurred in taking such additional remedial actions if the Respondents fail to comply with such a directive. Finally, the Department reserves all rights and remedies under the Spill Compensation and Control Act in addition to those referred to above.

Respondents are advised that the discharges referenced in the DIRECTIVE may also constitute violations of the Water Pollution Control Act, *N.J.S.A.* 58:10A-1 *et seq.* and that Respondents may therefore be subject to the penalties prescribed for violations of the Water Pollution Control Act. The Department reserves all rights and remedies under said Act.

Appendix G

DEPARTMENT OF ENVIRONMENTAL PROTECTION

s/ Joseph A. Rogalski
Joseph A. Rogalski
Assistant Director
Field Operations, Compliance
and Enforcement

DATE: May 29, 1986

If you have any questions regarding this Directive please contact Richard J. Ericsson, Esq. at (609) 292-9398.

Yours truly,

s/ Joseph A. Rogalski
Joseph A. Rogalski
Assistant Director

Enclosure
c: Sylvia Unseld
David Shotwell
Kimberly Hoover
Richard J. Ericsson, Esq.
Jack B. Kirsten
Corporation Trust Company

APPENDIX H—STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION DIRECTIVE II IN THE MATTER OF KIMBER PETROLEUM CORPORATION AND SOLAR OIL SUSSEX, INC., DATED MARCH 3, 1987

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Division of Hazardous Waste Management
John J. Trela, Ph.D., Acting Director
401 East State St.
CN 028
Trenton, N.J. 08625
609-633-1408

DIRECTIVE II

IN THE MATTER OF KIMBER PETROLEUM CORPORATION and SOLAR OIL SUSSEX, INC.

Respondents

This Directive II is issued to the above-captioned Respondents pursuant to the authority vested in the Commissioner of the New Jersey Department of Environmental Protection (hereinafter the "Department" or "NJDEP") by N.J.S.A. 13:1D-1 *et seq.* and the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 *et seq.*, and duly delegated to the Assistant Director for Enforcement of the Division of Hazardous Waste Management, pursuant to N.J.S.A. 13:1B-4.

FINDINGS

1. The NJDEP issued Directive I to Kimber Petroleum Corporation, Solar-Oil Company and Shell Oil Company on May 29, 1986. The FINDINGS set forth therein are incorporated by reference into this Directive II and are made part hereof.

2. Based upon information available at the time that Directive I was issued, the NJDEP believed that Solar-Oil Company was a proper Respondent. Solar-Oil Company alleged in correspondence dated June 23, 1986, that the proper responsible party was Solar Oil Sussex, Inc., a related company to Solar Oil Company. The Department concurs.

3. Solar Oil Sussex, Inc. had actual notice of its potential responsiblity under Directive I and has, through its representatives, communicated with the Department regarding the terms of compliance with Directive I.

4. Based upon information available at the time that Directive I was issued, the NJDEP believed that Shell Oil Company was a proper Respondent. The Department has reviewed data submitted by Shell Oil Company on August 29, 1986 and subsequent confirming submissions, as well as submissions made by Kimber Petroleum Company on December 1, 1986. Upon review of all evidence now before the Department, the Department has concluded that it does not have sufficient evidence to implicate Shell Oil Company as responsible for the contamination and, therefore, DIRECTIVE I should be withdrawn with regard to Shell Oil Company.

5. Paragraph fourteen (14) of Directive I stated the following:

> "In order to provide those residences and commercial establishments whose domestic wells have been contaminated, with a safe, dependable supply of potable water; and in order to eliminate the threat posed to the water supply of certain other residences and commercial establishments, it is necessary to:

Appendix H

a. Connect, by a transmission main with related appurtenances and valves, the Stainsby Court homes to the production wells in Greenbrook Estates. This will include distribution mains and homeowner connections with individual water meters.

b. Develop a new supply source of at least 75 gpm capacity in an area outside of the zone of contamination as designated by New Jersey Geological Survey. This will include designing and constructing the appropriate test wells, treatment, drilling and outfitting no more than two supply wells, facilities, and well houses. A transmission line will carry the water to the service area. After this supply source is completed, the Greenbrook production wells will be taken off-line and may be upgraded. A storage tank of 150,000 gallon capacity will be installed.

c. Replace the current distribution system in Greenbrook Estates with appropriately sized water mains and related appurtenances and valves, and homeowner connections with individual water meters.

d. Connect Woodland and Slater Roads with distribution mains, related appurtenances and valves, and homeowner connections with individual water meters.

e. Seal all private wells in the designated project area."

6. Subsequent to the issuance of Directive I, the Department consulted with representataives of the homeowners in Stainsby Court, and it was concluded that Stainsby Court would not be connected to Greenbrook Estates, as indicated in subparagraph 14a of Directive I, quoted in paragraph four (4) above, until the new source of water supply was developed. Accordingly, though the Stainsby Court and Greenbrook Estates water systems are to ultimately be connected by a transmission main, it is no longer considered part of the first phase of the water supply project contemplated in Directive I, but rather is to be undertaken after the new water supply source is developed under subparagraph 14b of Directive I.

7. Paragraph sixteen (16) of Directive I directed the Respondents to do the following:

> "Arrange for the conduct of the work referenced in paragraph 15 by paying $2,164,137 to the Department to fund the costs of the work referenced in paragraph 14 [as quoted in paragraph 4 above] within thirty (30) calendar days after receipt of this DIRECTIVE. Payment shall be made by certified check payable to "Treasurer, State of New Jersey".

8. The sum of money identified in Paragraph 16 of Directive I included $3,000 per homeowner that is to be contributed by ninety-four of the homeowners to be connected to the new water supply, for a total of $282,000. The Department has determined that this sum need not be included in the total estimated cost of the water supply project.

Appendix H

DIRECTIVE ADDENDUM

NOW, THEREFORE, DIRECTIVE I IS HEREBY AMENDED AS FOLLOWS:

9. References in Directive I to "Solar-Oil Company" are hereby amended to refer to "Solar Oil Sussex, Inc.".

10. Directive I is withdrawn as applicable to Shell Oil Company.

11. The connection of Stainsby Court to Greenbrook Estates is not to be considered part of the first phase of the water supply project described in paragraph fourteen (14) of Directive I, but rather is to occur after the development of the new water supply source described in subparagraph 14b. The estimated cost of the Project is not changed by this modification.

12. Paragraph sixteen (16) of Directive I is amended to state as follows:

> "Arrange for the conduct of the work referenced in paragraph 15 by paying *$1,882,137* to the Department to fund the costs of the work referenced in paragraph 14 within thirty (30) calendar days after receipt of this DIRECTIVE. Payment shall be made by certified check payable to "Treasurer, State of New Jersey".

NOTICE

13. Should future investigations at the site defined in Directive I reveal new evidence to the Department of potential responsibility on the part of Shell Oil Company, the Department reserves the

right to take appropriate action against Shell. Further, should the Department or the Respondents need to take, or have taken, samples or monitor, or have monitored, any of the walls installed by Shell's contractor at the site, Shell will be expected to cooperate. Prior written approval of the Department is required in the event that Shell desires to seal any of its wells at the site.

14. This Directive II in no way affects the duties and obligations of the Respondents under the terms of Directive I, unless specifically modified under the terms of this Directive II.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: s/ Ronald T. Corcory
Ronald T. Corcory
Assistant Director for Encorcement
Division of Hazardous Waste
Management

DATE: 3/3/87

APPENDIX I—NOTICE OF APPEAL DATED AUGUST 22, 1988

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

KIMBER PETROLEUM CORPORATION,

Appellant,

vs.

CHRISTOPHER J. DAGGETT, ACTING COMMISSIONER OF THE STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellee.

Kimber Petroleum Corporation hereby gives notice of its intention to appeal from the judgment and opinion of the New Jersey Supreme Court filed April 18, 1988 and the denial of the motion for recommendation [*sic. - should read reconsideration*] filed May 25, 1988. This appeal is taken under 28 U.S.C. § 1257(2). This appeal is from the judgment of the New Jersey Supreme Court upholding the constitutionality of the enforcement mechanism of the New Jersey Spill Compensation and Control Act and from that portion of the judgment which affirms the directive issued to Kimber Petroleum Corporation pursuant to the New Jersey Spill Compensation and Control Act.

Dated: August 22, 1988

Appendix I

s/ Edwin R. Matthews
Edwin R. Matthews
BUDD LARNER GROSS
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FILED
OCT 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-461

In The
Supreme Court of the United States
October Term, 1988

KIMBER PETROLEUM CORPORATION,
Appellant,

v.

CHRISTOPHER J. DAGGETT, Acting Commissioner, State of New Jersey, Department of Environmental Protection,
Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE TO DISMISS OR AFFIRM AND APPENDIX

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58pp

QUESTIONS PRESENTED

1. Whether the treble damages provision within New Jersey's Spill Compensation and Control Act, *N.J.S.A.* 58: 10-23.11 et seq., which authorizes under certain circumstances but does not require an award of three times the State's costs in addressing hazardous contamination against those parties deemed liable for the cleanup satisfies the requirements of the due process clause?

2. Whether Kimber Petroleum Corporation was denied due process by the New Jersey Supreme Court's order requiring it to abide by its prior pledge to pay for the provision of an alternate water supply to an area affected by groundwater contamination if the Court sustained the validity of the directive of the New Jersey Department of Environmental Protection that sought such payment?

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No. 88-461

In The

Supreme Court of the United States

October Term, 1988

KIMBER PETROLEUM CORPORATION,

Appellant,

v.

CHRISTOPHER J. DAGGETT, Acting Commissioner, State of New Jersey, Department of Environmental Protection,

Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE TO DISMISS OR AFFIRM AND APPENDIX

MOTION OF APPELLEE TO DISMISS OR AFFIRM

Appellee, Christopher J. Daggett, Acting Commissioner, State of New Jersey, Department of Environmental Protection respectfully moves pursuant to *R.* 16(1)(b) and (d) to dismiss this appeal or affirm the judgment and order of the New Jersey Supreme Court because the issues presented do not raise substantial federal questions meriting plenary review by this Court, and because this case was correctly decided below in keeping with uniform federal caselaw upholding the constitutional validity of treble damages provisions that contain good faith defenses to treble liability.

COUNTERSTATEMENT OF THE CASE

This appeal questions the constitutionality of the treble damages provision of New Jersey's Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11 *et seq.* ("the Spill Act"), which authorizes, under certain circumstances, the award of three times those costs incurred by the State in responding to hazardous waste contamination. *N.J.S.A.* 58:10-23.11f(a). As this Court recognized in *Exxon v. Hunt,* 475 *U.S.* 355 (1986), New Jersey's Spill Act prohibits the release of hazardous substances into the environment and seeks to insure that all necessary cleanup and removal measures are performed in response to any release. To conserve the scarce public funds available for cleanup activities, the Spill Act seeks to encourage those responsible for the contamination to address promptly their liability with their own private resources. *See N.J.S.A.* 58:10-23.11a. The Act's principal means of encouraging private party cleanups is the risk of treble damages that may be imposed on a private party if government must clean up the toxic contamination with public monies.

The mechanics of the Spill Act's treble damages provision are relatively straightforward. In response to an incident of contamination, the New Jersey Department of Environmental Protection ("NJDEP") can choose either to perform the necessary response itself or to direct those parties believed to be responsible for the contamination to take or arrange for the cleanup and removal activity. *N.J.S.A.* 58:10-23.11f(a). If the NJDEP seeks private participation in the cleanup activity, it is empowered to issue a directive to those believed responsible for the discharge

of the hazardous substances, notifying those parties of their perceived liability for the discharge and specifying the nature of the removal activities deemed necessary to address the discharge. If the recipient of the directive uses its own funds to perform those cleanup activities identified by the NJDEP, the legislative goal of conserving scarce public cleanup funds is served.

However, if the recipient of a cleanup directive fails to perform the identified cleanup measures, and if the NJDEP performs the cleanup with public funds, the State can sue the directive recipient for recovery of three times the cost of the cleanup activities. *N.J.S.A.* 58:10-23.11f(a). This cause of action for treble damages, which may be pursued by the State against parties who are ultimately found liable for necessary cleanup measures, is the central incentive within the legislative scheme to encourage timely and adequate private participation in toxic waste cleanups.*

The circumstances in which the NJDEP utilizes the directive device are well exemplified by this case. After employees at a local restaurant in the Township of West Milford, Passaic County, New Jersey, noticed a strong odor in the water from the restaurant's well, the NJDEP

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*In addition to performing the cleanup measures identified by the NJDEP or refusing to do so, directive recipients also possess a third possible course of action. If the recipient believes that some but not all of the cleanup measures identified by the NJDEP are necessary, the recipient can pay for those activities agreed to be necessary, thereby reducing the dispute between the State and the directive recipient to those measures that the private party believes to be unnecessary and, accordingly, reducing the party's exposure to a cause of action for treble damages.

investigated the nature and source of the contamination. State investigators uncovered a serious ground water contamination problem emanating from two local gasoline stations. One of these stations was owned by S.K.S. Inc., a corporate relative of Kimber Petroleum Corporation ("Kimber"), *see* Jurisdictional Statement at ii, n.*, was leased to Kimber and was subleased by Kimber to the gasoline station's operators to which Kimber supplied gasoline. Gasoline that had escaped the underground tanks at these service stations had already seriously damaged the water supply in one local neighborhood and was headed for a second neighborhood that also relied on local ground water for its drinking water supply.* The levels of contamination uncovered by the NJDEP were exceptionally high. For example, although the State requires the provision of an alternate water supply when concentrations of benzene—a potent carcinogen—reach 6.8 parts per billion (ppb), the water supply in one local residential well was contaminated with benzene at concentrations exceeding 5000 ppb.

Although Kimber, one of the parties seen as liable by the NJDEP, provided carbon filters and bottled water to those residents whose wells were contaminated with gasoline constituents, the NJDEP determined that a long-term, alternate water supply source was necessary to serve both neighborhoods placed at risk from the contamination. After

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*Although the appellant informs this Court that only part of the area to be supplied with a new water system was actually suffering from contamination, Jurisdictional Statement at 2, it neglects to report that the other neighborhood to be served by the new water system was the neighborhood that is downgradiant of the plume of contamination and therefore threatened with contamination.

evaluating a range of water supply alternatives, the NJDEP negotiated a contract with the local municipal utilities authority for the establishment of production wells outside the affected area and the construction of a water distribution system to transport the water to the affected neighborhoods.*

Prior to funding this contract with public monies, the NJDEP sought private financing of the new water system and issued a directive to several parties including Kimber identifying the nature of the contamination and the recipients' connection with the contamination, alleging the liability of the directive recipients under State law and specifying the nature of the remedial activities deemed necessary by the NJDEP. *See* Appendix to Jurisdictional Statement ("JSa") at JSa48 to JSa54. As modified, the directive sought the payment by July 17, 1986 of $1.88 million for the establishment of an alternate water supply in the affected neighborhoods. *See* JSa48 to JSa60. In the absence of litigation, Kimber and the other directive recipients, after evaluating their liability and the nature of the measures sought by the NJDEP, could either comply with the directive, refuse to comply with the directive or make a partial payment in mitigation of the directive. If the directive recipients refused to comply with the directive or paid for only part of the measures sought by the directive, the Department would proceed to fully fund the con-

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*The provision of an alternate water supply to a contaminated area constitutes a valid cleanup and removal expense under the Spill Act, which defines "cleanup and removal costs" to include the "taking of reasonable measures to prevent or mitigate damages to the public health, safety, or welfare . . . ." *N.J.S.A.* 58:10-23.11b(d).

tract and insure that the alternate water supply was provided to the affected neighborhoods. After expending the public monies, the NJDEP would then institute litigation seeking the recovery of the actual costs expended by the State and would also assert a cause of action to recover three times those costs from any directive recipient that failed to address its liability in a timely and adequate fashion.

The exact nature of the cause of action for treble damages that would be possessed by the State was one of the issues in controversy in this matter and has now conclusively been settled by the New Jersey Supreme Court's interpretation of the statutory scheme. Under the federal counterpart to the Spill Act—the Comprehensive Environmental Response, Compensation, and Liability Act, 42 *U.S.C.* § 9601 *et seq.* ("CERCLA")—, a party who refuses to comply with a federal cleanup order "without sufficient cause . . . may be liable" for treble damages. 42 *U.S.C.* § 9607(c)(3). This claim for treble damages under CERCLA has been unformly interpreted by the federal courts to authorize a treble recovery only against those who lack a good faith basis for refusing to comply with the CERCLA administrative order. *See Solid State Circuits, Inc. v. United States,* 812 *F.*2d 383 (8th Cir. 1987); *Wagner Seed Co. v. Daggett,* 800 *F.*2d 310 (2nd Cir. 1986); *Aminoil, Inc. v. United States,* 646 *F. Supp.* 294 (C.D. Cal. 1986); *Wagner Electric Corp. v. Thomas,* 612 *F. Supp.* 736 (D. Kan. 1985); *United States v. Reilly Tar and Chem. Corp.,* 606 *F. Supp.* 412 (D. Minn. 1985). In contrast to the good faith defense plainly contained within CERCLA, the treble damages provision within the Spill Act reads in mandatory terms. *N.J.S.A.* 58:10-23.11f(a) ("[a]ny discharger who fails to comply with such a directive *shall* be

liable to the Department in an amount equal to three times the cost of such removal.'') (emphasis supplied).

In light of the apparent mandatory nature of the Spill Act's treble damages provision, and in the absence of any State decisional law interpreting the provision, the NJDEP defended the constitutionality of the statute in the litigation below on the assumption that any judicial award of governmental cleanup costs was required to be trebled if the unsuccessful defendant had received a directive from the NJDEP prior to the expenditure of the public funds. In sharp contrast with the appellant's arguments to this Court, Kimber urged the New Jersey Supreme Court to engraft upon the Spill Act a good cause defense similar to that contained within CERCLA as a means of insuring the constitutionality of the State cleanup law. *See* Transcript* at A17 (under CERCLA, "treble damages are not mandatory but are discretionary and, two, you have a good faith defense at the post-enforcement proceeding where if, if, if you've acted in good faith you don't get subjected to the treble damage provision. And if there was the same such provision in the Spill Fund Act I think that that would save its constitutionality."); *id.* at A19 ("I think that there can be a penalty [for disregarding a directive] but it shouldn't be mandatory treble damages. It should be discretionary treble damages and, and it should be in cases where there is not a good faith defense.").

Consistent with the urging of the appellant, the New Jersey Supreme Court determined to avoid any doubts

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*Appellee has appended to this motion the complete transcript of the oral argument of counsel for Kimber before the New Jersey Supreme Court. Appellee will provide the entire transcript of oral argument if the Court so desires.

of the constitutionality of the Spill Act's treble damages provision, *In the Matter of Kimber Petroleum Corp.*, 110 *N.J.* 69, 82-83, 539 *A.*2d 1181, 1188 (1988) (hereinafter "*I/M/O Kimber*"), and interpreted the Act to authorize, but not mandate, an award of treble damages against any party found liable for cleanup and removal costs incurred by the State. *Id.*, 110 *N.J.* at 83, 539 *A.*2d at 1188. Specifically, the Court held

> that treble damages need not be assessed if the party opposing such damages had an objectively reasonable basis for believing that DEP's directive was either invalid or inapplicable to it, and that any decision by the DEP to seek treble damages in a recovery action be subject to judicial review as any other agency action. . . . A good-cause defense is relevant only once a company refuses to comply with the DEP directive and DEP moves in court to enforce the directive. In accordance with its directive the DEP in its enforcement action may seek treble damages as a penalty for non-compliance. If the court determines that a company's basis for non-compliance is objectively reasonable, even if the court does not ultimately uphold the company's argument, DEP's request for treble damages may be rejected if not reasonable in light of all the circumstances. [*Id.*, 110 *N.J.* at 83-84, 539 *A.*2d at 1188 (footnote omitted)].

Through its interpretation of the Spill Act, the New Jersey Supreme Court closely aligned the scope of the State treble damages provision with that contained within CERCLA; indeed, the New Jersey Supreme Court's articulation of the good faith exception to treble liability under the Spill Act derived directly from a United States Court of Appeals decision interpreting the treble damages provision in CERCLA. *See id.*, 110 *N.J.* at 77, 539 *A.*2d at 1185 (quot-

ing *Solid State Circuits, Inc. v. United States, supra,* 812 *F.*2d at 391). In light of the uniform decisions of federal courts upholding the constitutionality of CERCLA's treble damages provision, and in light of Kimber's express recognition that the Spill Act would be constitutional if interpreted to contain a good faith exception, the New Jersey Supreme Court apparently had little doubt that the Spill Act so interpreted would satisfy the federal due process clause and the State doctrine of fundamental fairness. *I/M/O Kimber, supra,* 110 *N.J.* at 82, 539 *A.*2d at 1188.

Because of the litigation before the New Jersey Supreme Court, the usual mechanics governing responding to a directive have been slightly altered in this case as a result of interlocutory relief obtained by Kimber. After the Appellate Division of the New Jersey Superior Court refused Kimber's motion for a stay of the directive, JSa44 to JSa45, Kimber moved before the New Jersey Supreme Court for a stay of the directive pending appeal and other auxiliary relief. In response, the Supreme Court on its own motion directly certified the appeal and issued a partial stay of the directive. JSa38 to JSa40. The Court's partial stay extended for thirty days the period in which Kimber was "permit[ted] . . . either to make direct payment to fund costs as required by [the directive]or to furnish a satisfactory bond or other security conditioned upon the payment of said costs in the event the validity of said Directive is sustained on appeal. . . ." *Ibid.* If Kimber paid the costs sought by the directive or posted the satisfactory security identified by the Court, the Court provided that Kimber would be protected from any exposure to treble damages for failing to comply with the directive during the pendency of the motion for a stay and the pen-

dency of the appeal. *Ibid.* In essence, the New Jersey Supreme Court's interlocutory order provided Kimber an extended window of opportunity in which it could evaluate whether to comply with the directive and, if it chose to comply, it would be free of any risk of treble damages. The order also offered an alternative to the cash payment sought by the directive, authorizing the posting of security that would ensure payment if the Court upheld the validity of the directive on appeal.

Although Kimber now conveniently seeks to interpret the New Jersey Supreme Court's interlocutory order as compelling the payment of the requested sums and requiring compliance with the directive, a colloquy between counsel for Kimber and the Court at oral argument makes clear that Kimber understood that the Court's partial stay did not require compliance with the directive within thirty days, but simply sought for Kimber to finalize its response to the directive within the thirty day period. At oral argument, counsel for Kimber requested an extension of the thirty day period, which was about to expire. In response to this request, the following colloquy between the Court and counsel for Kimber ensued:

> The Court: "How are you prejudiced, Mr. Matthews? I don't understand."
>
> Mr. Matthews: "Well if we put up the money at this point we, one,—unless as Justice O'Hern has suggested, we can go to arbitration and then fight about it, we're in the position where the money is put up and is gone and we have no opportunity to get back and we have no opportunity to contest the validity of what the directive is designed to do."

> The Court: "You'd rather be exposed to the treble damage feature for the whole period of time rather than relieved of that?"
>
> Mr. Matthews: "No, I wouldn't, Your Honor."
>
> The Court: "That's the alternative, one of the obvious alternatives of the order."
>
> Mr. Matthews: "I understand what Your Honor is saying and I guess what I'm saying is I think my client would rather, if we could, make the decision when this Court has ruled on the issue."
>
> The Court: "Extend the stay. You would importune us to extend the stay to the date of decision, that is, you don't have to, you don't have to make any payment or deposit or bond until this case is decided? Is that your point?"
>
> Mr. Matthews: "Yes, your Honor, and then, and then if, if we pay then, you know, we've paid knowing what we know at that point. If we don't pay we run the risk." [Transcript at A28 to A29].

This colloquy makes clear that Kimber understood that it was not required to make any payment or post any security within the thirty-day period, but was simply given an extended opportunity to do so. In fact, Kimber sought an indefinite extension of the thirty-day period so that it "could make *the decision* when this Court has ruled on the issue." *Ibid.* (emphasis added). Although paying the monies was "one of the obvious alternatives of the order," *ibid.*, Kimber recognized that it had a decision to make and that it could refuse to pay any sums and remain exposed to a cause of action for treble damages depending upon the outcome of the litigation. Rather than take the risk of that exposure, Kimber determined to comply with the directive through the filing of affidavits by two of its in-

surance carriers pledging payment of the sum sought by the NJDEP in the event the validity of the directive was sustained on appeal by the New Jersey Supreme Court.

In its decision on the merits, the New Jersey Supreme Court ruled that the directive issued to Kimber complied with the Spill Act and was affirmed with the Court's modification of the statutory enforcement provision. *I/M/O Kimber, supra,* 110 *N.J.* at 86-87, 539 *A.*2d at 1190. As the Court explained in the companion case to *I/M/O Kimber,* the directive complied with the Spill Act "but cannot be enforced as issued." *I/M/O J.I.S. Industrial Service Co. Landfill,* 110 *N.J.* 101, 112, 539 *A.*2d 1197, 1203 (1988). In applying this holding to the security posted by Kimber's insurance companies to pay the required monies if the validity of the directive was upheld, the final paragraph of the opinion of the New Jersey Supreme Court makes clear that the insurance carriers were required to comply with the pledges made in the affidavits to pay the promised sums. Specifically, the Court wrote:

> Accordingly, we rule that the DEP directive issued to Kimber Petroleum and Solar Oil threatening treble damages upon noncompliance complies with the Spill Act. The provisions of the DEP directive ordering the payment of removal costs are valid and enforceable subject, however, to any good-cause defense that may be raised by the appellants. Nevertheless, in this case we need not consider further the applicability of a good-cause defense as a basis for denying treble damages because the Court has ordered the parties to pay the remedial costs assessed by the directive or security for those costs and has for purposes of this appeal excused liability for treble damages based upon the earlier failure of the parties to have complied with the DEP directive. The directive of DEP,

> as modified by the order of this Court on appeal, is affirmed. [*Id.*, 110 *N.J.* at 86-87, 539 *A.*2d at 1190.]

Although this concluding paragraph of the Court's opinion leaves little doubt that Kimber's insurance carriers were required to honor their promise to pay the required monies—the promise that had the effect of freeing Kimber from any future prospect of treble damages for the remedial activities—, Kimber moved before the New Jersey Supreme Court for reconsideration. In this motion, Kimber offered a unique interpretation of the New Jersey Supreme Court's interlocutory order and ultimate ruling. As Kimber's moving papers revealed,

> Kimber interprets the Court's opinion and order upholding the directive to mean that it must decide within 30 days (the time set out in the [interlocutory] order) whether it intends to comply with the DEP directive or risk the application of the treble damage portion of the directive. Kimber realizes that if it refuses to pay the amount set forth in the directive or any portion thereof, that it might be liable for treble damages at a post enforcement proceeding.

In the NJDEP's responsive papers on the motion, the NJDEP called to the Court's attention that Kimber's interpretation did not correspond with the language within the Court's interlocutory order or with Kimber's own prior interpretation of the order. *See* JSa38 to JSa40; Transcript at A27 to A30. After considering the matter, the New Jersey Supreme Court denied Kimber's motion for reconsideration.

Dissatisfied with the requirement that Kimber honor the pledge to pay contained in the affidavits of its insurance carriers, Kimber filed on August 22, 1988 a notice of

appeal with this Court from the judgment of the New Jersey Supreme Court and from that Court's denial of the motion for reconsideration. Kimber's jurisdictional statement was formally submitted thereafter. Appellee Christopher Daggett, Acting Commissioner of the NJDEP, urges this Court to dismiss this appeal for want of a substantial federal question meriting plenary review, or to affirm the judgment and order issued in this matter by the New Jersey Supreme Court. In support of this motion, appellee relies upon this brief and appendix and the opinion rendered by the Court below.

———o———

ARGUMENT

PLENARY REVIEW OF THIS APPEAL IS NOT WARRANTED BECAUSE NEW JERSEY'S SPILL COMPENSATION AND CONTROL ACT AS INTERPRETED BY THE NEW JERSEY SUPREME COURT PLAINLY SATISFIES THE FEDERAL CONSTITUTIONAL REQUIREMENT OF DUE PROCESS AND BECAUSE THE NEW JERSEY SUPREME COURT'S REQUIREMENT THAT THE APPELLANT COMPLY WITH ITS PLEDGE TO FUND CERTAIN CLEANUP ACTIVITIES IN NO WAY RAISES ANY ISSUE OF CONSTITUTIONAL MAGNITUDE.

In this appeal, Kimber seeks for this Court to review the constitutionality of the Spill Act as interpreted by the New Jersey Supreme Court as well as the post-judgment order of the New Jersey Supreme Court that requires Kimber to comply with its previous pledge to pay

$1.88 million to the NJDEP for the installation of an alternate water supply. The first of these issues—the facial constitutionality of a treble damages provision that contains a good faith defense—was conceded by the appellant at oral argument before the New Jersey Supreme Court. Furthermore, there can be no fair doubt as to the constitutionality of the Spill Act's treble damages provision because of its similarity to that within CERCLA, which has been uniformly upheld as constitutional by the federal courts. Finally, Kimber's complaint that it is now being required to comply with its prior pledge to pay for certain cleanup activities is hardly the sort of substantial constitutional issue meriting plenary review by this Court because no party other than Kimber will ever be affected by the New Jersey Supreme Court's ruling with respect to this matter and because the New Jersey Supreme Court has simply required that Kimber abide its previous decision to pay the required sums if the validity of the directive under challenge was upheld.

A. The Constitutionality Of The Treble Damages Provision Of The Spill Act As Interpreted By The New Jersey Supreme Court Was Conceded Below By The Appellant And Is Confirmed By Uniform Federal Decisions Upholding The Comparable Treble Damages Provision Contained In CERCLA.

The first issue raised by the appellant is the constitutionality of the Spill Act's treble damages provision, which authorizes an award of three times the cleanup costs incurred by the NJDEP if the NJDEP directed the defendant to undertake the cleanup measures prior to the expenditure of public funds *unless* that party "had an

objectively reasonable basis for believing that DEP's directive was either invalid or inapplicable to it. . . ." *I/M/O Kimber, supra,* 110 *N.J.* at 83, 539 *A.*2d at 1188.* It is highly ironic that Kimber now argues that "adding a good cause defense to the Spill Act modeled after the federal Comprehensive Environmental Response Compensation and Liability Act, 42 *U.S.C.* § 9607(c)(3) (1982), as the New Jersey Supreme Court has done, is insufficient to save the statute." Jurisdictional Statement at 9. After all, it was Kimber that conceded at oral argument before the New Jersey Supreme Court that the engrafting of a good cause defense upon the treble damages provision within the Spill Act would satisfy all constitutional requirements. Transcript at A17. Since Kimber conceded the constitutionality of a treble damages provision under which defendants can assert good faith defenses to treble liability, it has waived its right to argue the constitutionality of that type of statutory enforcement mechanism and cannot properly seek review by this Court of the accuracy of its prior concession. *See Wilson v. Byron Jackson Co.,* 93 *F.*2d 572, 573 n.2 (9th Cir. 1937) (a party may not seek review of a trial concession on appeal); *Andrews v. St. Louis Joint Stock Land Bank,* 127 *F.*2d 799, 804 (8th Cir. 1942) (a party may not seek appellate review of an issue

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*Although the jurisdictional statement filed by the appellant complains at times of the Spill Act's so-called mandatory treble damages provision, see Jurisdictional Statement at 5, 7 and 9, the New Jersey Supreme Court has plainly interpreted the Spill Act to contain a discretionary—rather than a mandatory—treble damages provision. *See I/M/O Kimber, supra,* 110 *N.J.* at 83, 539 *A.*2d at 1188. It is well settled that this Court must abide this interpretation of state law adopted by the highest court of the State of New Jersey. *Hortonville J.S.D. No. 1 v. Hortonville Ed.,* 426 *U.S.* 428, 488 (1976).

waived at trial); *see also Singleton v. Wulff*, 428 *U.S.* 106, 120 (1976) (a federal appellate court will not ordinarily review an issue that an appellant failed to raise below).

Even if Kimber could properly seek review of the constitutionality of the treble damages provision as interpreted by the New Jersey Supreme Court, this issue plainly fails to state a substantial federal question meriting plenary review. The appellant's constitutional theory has its origins in *Ex Parte Young*, 209 *U.S.* 123 (1908), which establishes that a statutory enforcement scheme will violate due process if "the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate [a party] from resorting to the courts to test the validity of the legislation." *Id.*, 209 *U.S.* at 147. However, all of the federal courts that have reviewed the constitutionality of CERCLA's treble damages provision in light of *Ex Parte Young* and its progeny have affirmed the constitutionality of the federal statute. *See Solid State Circuits, Inc. v. United States, supra; Wagner Seed Co. v. Daggett, supra; Aminoil, Inc. v. United States, supra; Wagner Electric Corp. v. Thomas, supra; United States v. Reilly Tar and Chem. Corp., supra; see also City of Quincy v. Carlson*, 517 *N.E.*2d 33 (Ill. App. Ct. 1987) (upholding the constitutionality of the treble damages provision of the Illinois Environmental Protection Act against a due process challenge made under the *Ex Parte Young* doctrine). This uniform verdict as to the constitutionality of CERCLA's treble damages provision with its good faith exception was explained by the United States Court of Appeals for the Second Circuit as follows:

> *Ex Parte Young*, established that mandatory penalties incurred because a party has chosen to seek judicial review are unconstitutional where "the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation. . . ." 209 *U.S.* at 147, 28 *S.Ct.* at 449. "The constitutional requirement is satisfied by a statutory scheme which provides an opportunity for testing the validity of statutes or administrative orders without incurring the prospect of debilitating or confiscatory penalties." *Brown & Williamson Tobacco Corp. v. Engman*, 527 *F.*2d 1115, 1119 (2d Cir. 1975), *cert. denied* 426 *U.S.* 991, 96 *S.Ct.* 2237, 48 *L.Ed.*2d 837 (1976). One way of ensuring that a plaintiff is not faced with such unconstitutional penalties was to require that no penalty be imposed where a challenge was brought in good faith. *Oklahoma Operating Co. v. Love*, 252 *U.S.* 331, 338, 40 *S.Ct.* 338, 340, 64 *L.Ed.* 596 (1920) ("[A] permanent injunction should . . . issue to restrain enforcement of penalties accrued *pendent lite*, provided that it also be found that the plaintiff *had reasonable ground to contest* them as being confiscatory") (emphasis added). *Accord Reisman v. Caplin*, 375 *U.S.* 440, 446-47, 84 *S.Ct.* 508, 512-13, 11 *L.Ed.*2d 459 & n.6 (1964); *see also Wagner Elec. Corp. v. Thomas*, 612 *F. Supp.* 736, 742-45 (D. Kan. 1985) (interpreting *Ex Parte Young* and *Reisman*). [*Wagner Seed Co. v. Daggett, supra*, 800 *F.*2d at 315-16.]

The correctness of the uniform holding of the federal courts interpreting CERCLA's treble damages provision is confirmed by prior decisions of this Court upholding treble damages provisions in light of due process challenges based upon *Ex Parte Young, see, e.g., Missouri Pacific Railway Co. v. Tucker*, 230 *U.S.* 340 (1913); *see also Overnight Motor Transp. Co. v. Missel*, 316 *U.S.* 572 (1942) (upholding the constitutionality of the award of double damages

against a due process claim under the *Ex Parte Young* doctrine), even when the multiple damage award is authorized following the refusal of the liable party to meet a reasonable demand for compensation set forth in a written notice. *See Kansas City Southern Railway Co. v. Anderson,* 233 *U.S.* 325 (1914); *Yazoo & Mississippi Valley R.R. Co. v. Jackson Vinegar Co.,* 226 *U.S.* 217 (1912); *Seaboard Air Line Railway v. Seegers,* 207 *U.S.* 73 (1907).

In light of Kimber's concession below as to the constitutionality of a treble damages provision containing a good faith exception, and in light of the uniform caselaw upholding the constitutionality of such statutory enforcement mechanisms, this Court should refuse plenary review of this matter and either affirm the decision of the New Jersey Supreme Court below or dismiss this appeal for lack of a substantial federal question.

B. The New Jersey Supreme Court's Refusal To Release Kimber From Its Prior Pledge To Pay The Sums Required To Respond To Its Release Of Hazardous Substances Raises No Constitutional Issue Of Any Magnitude.

The second issue raised by Kimber in this appeal derives from its discontent with the New Jersey Supreme Court's requirement that Kimber abide by its prior decision to pay the $1.88 million for the establishment of an alternate water supply if the validity of the directive was upheld. As an initial matter, this issue fails to raise a substantial federal question because it derives from the interlocutory relief obtained in this litigation and, conse-

quently, will never apply to any party other than Kimber.* Because the circumstances underlying Kimber's contention will never be repeated, this claim fails to raise the type of substantial federal question meriting this Court's plenary review.

Moreover, Kimber's current claim is premised upon a mischaracterization of the interlocutory order of the New Jersey Supreme Court that provided Kimber with an extended opportunity to pay or post security for the $1.88 million for the alternate water supply. As indicated *supra,* the New Jersey Supreme Court simply permitted Kimber an additional 30 days within which it could either pay the required monies or post a satisfactory security that would ensure payment if the validity of the directive was upheld. When Kimber made its decision to post the affidavits of its insurance carriers promising payment if the validity of the directive was upheld, it clearly understood that it was electing one of the alternatives available to it. Once Kimber made its decision and elected to provide the pledges of its insurance carriers to pay if the validity of the directive was upheld on appeal, it cannot fairly complain that the New Jersey Supreme Court has required that it comply with that pledge.**

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*As Kimber has informed the Court, the only other party to which the partial stay applied—Solar Oil Sussex, Inc.—failed to take any action to comply with the directive in the extended window for a response provided by the New Jersey Supreme Court. See Jurisdictional Statement at 10, n.2.

**Indeed, Kimber's current theory that the interlocutory order of the New Jersey Supreme Court required the payment of the necessary monies is inconsistent with their asserted posi-

(Continued on following page)

Because the New Jersey Supreme Court's requirement that Kimber honor its pledge to pay the sums promised in the affidavits supplied to the NJDEP fails to raise any issue of substantial federal importance, and because the New Jersey Supreme Court fairly and properly required that Kimber abide by its prior election of alternatives, this Court should refuse plenary review of the decisions of the New Jersey Supreme Court and should either affirm those actions or dismiss this appeal.

—o—

CONCLUSION

It is respectfully submitted that for the foregoing reasons this appeal should be dismissed or the judgment and order of the New Jersey Supreme Court affirmed.

(Continued from previous page)

tion before the New Jersey Supreme Court when seeking reconsideration of that Court's decision. In its motion, Kimber interpreted the interlocutory order as providing it an opportunity after issuance of the Court's opinion to determine how to respond to the NJDEP directive. By contrast, in the current appeal, Kimber has revised its position to claim that the interlocutory order compelled payment of the disputed monies, a position clearly at odds with their prior claim that they still retain a choice as to how to respond to the NJDEP directive.

Respectfully submitted,

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Dated: October 13, 1988

(p. 1) THE SUPREME COURT OF NEW JERSEY

Docket Nos. A-126, A-127 and A-128

re: IMO DIRECTIVE OF DEPARTMENT OF ENVIRONMENTAL PROTECTION ISSUED TO KIMBER PETROLEUM, etc.,	TRANSCRIPT OF PROCEEDINGS
and	November 18, 1986
re: IMO J.I.S. INDUSTRIAL SERVICES LANDFILL, et al	

IN ATTENDANCE:

CHIEF JUSTICE ROBERT N. WILENTZ
JUSTICE ROBERT L. CLIFFORD
JUSTICE ALAN B. HANDLER
JUSTICE STEWART G. POLLOCK
JUSTICE DANIEL J. O'HERN
JUSTICE MARIE L. GARIBALDI
JUSTICE GARY S. STEIN

APPEARANCES:

EDWIN R. MATTHEWS, ESQ., for Appellant, Kimber Petroleum

EDWARD J. FARRELL, ESQ., for Appellant, Solar Oil Company

JAMES E. STAHL, ESQ., for Appellant, J.I.S. Industrial Service Company Landfill

ROSS E. LEWIN, D.A.G., for Respondent, Department of Environmental Protection

(p. 2) CHIEF JUSTICE WILENTZ: The first matter is A-127 and A-128, In the Matter of the Directive of the New Jersey Department of Environmental Protection issued to Kimber Petroleum Corporation, Shell Oil—Shell Company and Solar Oil Company and A-126, IMO J.I.S. Industrial Service Company Landfill.

Mr. Matthews?

Mr. Matthews: Thank you, your Honor. Your Honor, may Mr. Farrell and I reserve a total of six minutes for rebuttal between the two of us?

Chief Justice Wilentz: Right on the button, six minutes.

Mr. Matthews: We figure that was easier to divide than five.

Chief Justice Wilentz: Okay.

Mr. Matthews: Good morning. My name's Edwin Matthews and our firm is counsel to Kimber Petroleum in this matter.

What—I guess what I'd like to do is indicate to the Court what I think this is not. This is not an appeal on the merits. Essentially the record that we have before the Court is totally inadequate for the purposes of showing what has transpired here below. This appeal raises the fundamental issue of whether the Department of Environmental Protection has the ability to issue direc-(p. 3)tives to parties who are refusing to give them a pre-enforcement hearing and while refusing to give them a hearing subsequent in which they can show good faith defenses for their noncompliance with the directive issued by the De-

partment. It's in essence a civil rights case. It's not an environmental case and it's a civil rights case because of these two reasons: the fact that we do not have a pre-enforcement hearing and the fact that we do not have a, a post-enforcement hearing in which there can be good faith defenses for noncompliance coupled with the mandatory treble damage provisions of the Spill Fund Act.

Chief Justice Wilentz: You mean an unconstitutional proceeding or a failure to give your client due process?

Mr. Matthews: Yes, your Honor. It's a procedural due process—

Chief Justice Wilentz: Due process in, in cleaning up pollution or in the procedures and mechanisms that go in that direction. I'm not quite sure how it becomes civil rights.

Mr. Matthews: Because the client, as, as any party that is the, the recipient of a directive from the State—

Chief Justice Wilentz: Is entitled to due process.

Mr. Matthews: Is entitled to due process and (p. 4) the fact that we are—

Chief Justice Wilentz: You would equate due process with civil rights in, in that sense?

Mr. Matthews: Yes, I would, your Honor.

Chief Justice Wilentz: Alright. Fine. Well I didn't know it was a civil rights case until quite recently.

Mr. Matthews: It's—this is an appeal by two of the three named respondents in this case who are only two of nine potentially responsible parties at the site in West

Milford where there are three gas stations and there's a combination of at least nine people who are or should be responsible parties. The—it's our feeling that the actions of the DEP in issuing its directive are so fundamentally unfair that this Court should step in and, and afford the parties their due process rights.

The Court: Do you think it's just a question in a case such as this where the DEP has abused its discretion by being too selective in terms of focusing on an alleged responsible party and leaving others out?

Mr. Matthews: It's not just that, your Honor. I think that that's just one of the examples of the fundamental unfairness of what the DEP has done.

The Court: Would you be contending that the directive in this case would be fundamentally unfair if all nine alleged responsible parties had been the subject (p. 5) of the order for costs and treble damages?

Mr. Matthews: Absolutely, your Honor. I think that we are entitled to a pre-enforcement hearing in which the DEP has to justify to some extent its actions.

The Court: So then it is not simply the broad authority under the statute whereby DEP could select one or several of many responsible parties to be the target of its enforcement orders but the absence of any pre, as you say, pre-order hearing that, that you say goes to the question of fairness?

Mr. Matthews: Yes, your Honor. It's, it's a combination of things. It's not, for example, the strict liability. It's not the joint and several liability. It's not the punitive damages. It's, it's rather the combination of all of

these factors when taken together that makes the act unconstiutional with a lack of a pre-enforcement hearing and with a lack of a good faith defense to the failure to comply.

The Court: Well let's take one thing at a time. You would agree, no matter how painful it is, that the concept of joint and several liability if mandated by the Legislature would withstand constitutional scrutiny?

Mr. Matthews: I, I would agree with that, your Honor. As unhappy as I might be with that concept I would have to agree that the concept is constitutional.

(p. 6) The Court: And that there is a remedy here through this arbitration process.

Mr. Matthews: There is—Judge, that's what, what Judge Brotman said in Woodlands but that's not true. If you are a potentially responsible party, if you are the party who may be a discharger and may be liable under the act, you don't have the right under—

The Court: Don't the two ideas intersect? In other words, if it is found that you were not responsible, that your pollution did not cause the condition, should not the arbitrators direct the return of your funds?

Mr. Matthews: Yes, Judge, but, but that's not the problem, your Honor. It's a broader problem because you can be a discharger, as that term is defined in the act, without in any way being responsible for the pollution. If you are the owner of the property you can be—

The Court: That's correct. But, I mean, but the statute makes the owner liable to clean it up.

Mr. Matthews: That's correct, your Honor.

The Court: So, where are we going? In other words, if in the hearing the only issue that would save you can be decided by a fair tribunal, how have you been hurt?

Mr. Matthews: Judge, where in—I'm—

Chief Justice Wilentz: Your complaint is that (p. 7) if you're a discharged under this law you're responsible and that, therefore, at the end of the line when you go and you say, "I didn't do it. I want to get my money back", the arbitration board will not give you your money back because you're a discharger.

Mr. Matthews: That's correct.

Chief Justice Wilentz: But your real complaint there is the fact that you have become liable under the statute by virtue of being a discharger.

Mr. Matthews: My, my complaint is not—

Chief Justice Wilentz: But why should you get your money back if the Legislature has, with authority, made you liable?

Mr. Matthews: But, your Honor, the question then becomes, "What am I liable for?" Am I liable for what the DEP arbitrarily decides I am liable for or am I liable for, for, for cleaning up a pollution problem?

The Court: Well let's assume that the arbitrators are able to decide that because the language of the statute appears to give them the discretion or the ability to decide whether the amount is appropriate.

Mr. Matthews: Your Honor, I, I don't think that's the way the DEP interprets the statute and I'm not—

it's not clear in my mind that we would have a right as a discharger to have a hearing at an arbitration proceeding (p. 8) in which we would be able to raise issues of the efficacy of the order.

The Court: You mean the arbitrator can't determine the cost?

Mr. Matthews: Pardon, your Honor?

The Court: Is your point that the arbitrator cannot determine the cost, that's not one of the things in issue that he would make a determination about?

Mr. Matthews: That's correct, your Honor.

The Court: That's fixed when you go into arbitration?

Mr. Matthews: It's fixed when you go into arbitration. We're essentially—

The Court: Well, excuse me, doesn't the statute state that the board shall be convened when persons alleged to have caused the discharge, the administrator or other persons can test the validity or amount of damage claims or clean up and removal costs presented to the fund for payment? That's what the statute says.

The section, counsel, is 58:10-23.11N.

I'm not suggesting it's definitive. I mean, it just appears to me to suggest that those arbitrators would have the ability to decide the validity of the clean up costs because it is possible that there may be exaggerated and inflated costs that have been attributed to a party (p. 9) or even inappropriate.

The Court: Counsel, can I—what exactly, if there were a hearing, what exactly would you, would you be trying to prove. That, I think if you told us that even though we're not in the merits it would help me to understand what—

Mr. Matthews: Your Honor, we're in a very difficult position because we right now don't know why DEP did what they did, what the justification for this directive is, what the reasoning is for their saying to us, "Give a brand new water system to, to—

The Court: Greenbrook.

Mr. Matthews: —Greenbrook", when Greenbrook has had a water system that's, that's been a problem to DEP for at least the last six or seven years. It's been in litigation in receivorship before Judge Dwyer for that time. It's been a totally bankrupt, in all respects, water company. Now they're saying, "Go give them a new water system". We ask, "Why?" There's no answer. We don't have any way to find out why they're telling us to do what they're telling us to do.

The Court: Well wouldn't the question of the validity of the directive and the cause as well as the amount be a subject for arbitration and if it would be your position that there is no factual basis for that par-(p. 10)ticular order why wouldn't that be an issue that would be available to the arbitrator?

Mr. Matthews: Judge, I—my understanding and, and, and I'll be honest, maybe I went in with a, with a total misunderstanding of this act. My understanding was that we were clearly not entitled to the arbitration proceeding.

The Court: At all.

Mr. Matthews: At all.

The Court: Simply because you are "a discharger".

Mr. Matthews: If you are a discharger. And that under those circumstances we've got to have an ability through a pre-enforcement hearing to find out—

Chief Justice Wilentz: You mean, you thought that at the end of the line you couldn't challenge anywhere the amount of money that you had to give to DEP?

Mr. Matthews: That's correct, that we could not challenge.

Chief Justice Wilentz: Anywhere.

Mr. Matthews: Anywhere.

Chief Justice Wilentz: At neither a pre-enforcement nor a post enforcement?

Mr. Matthews: That's correct, your Honor.

Chief Justice Wilentz: If you thought that the arbitration proceeding would be required to consider both (p. 11) liability and amount of liability you'd look at this perhaps somewhat differently?

Mr. Matthews: I think that's correct, your Honor. Then I think we would have to examine it but I don't think that that necessarily saves the act because I think as a matter of, of—as (Name indiscernible) says, we're entitled to that hearing pre-enforcement.

Chief Justice Wilentz: Would you like the statute better if it had just a regular straightforward treble dam-

age clause, no, no directive. You don't have to put money up but at the end of the line you get treble damages—you have to pay treble damages.

Mr. Matthews: Treble damages though for what, your Honor?

Chief Justice Wilentz: For the damage done by your discharge.

Mr. Matthews: Judge, again there's problems with that because if, if I am "a polluter", and went in the middle of the night and did a dumping that might be fair because—

Chief Justice Wilentz: Well for a moment—

Mr. Matthews: —I'd be punished—

CHIEF JUSTICE WILENTZ: For a moment let's talk about not what's fair but what the Legislature has the power to say. Do you have any question but that the Legis-(p. 12) lature has the power to render you liable for the damages you cause, strictly liable, without proof of negligence for damage caused by your discharge of the extra hazardous material?

Mr. Matthews: I don't think in all cases that it can be done that broadly.

Chief Justice Wilentz: In other words, you have some doubt about the underlying power of the Legislature that imposes no fault liability on polluters?

Mr. Matthews: Judge, it's—the problem is, is it's not no fault in, in, in, in the sense of, of, of an automobile case. It's no fault in a greater sense. In an automobile case—

Chief Justice Wilentz: It's no fault in the sense that you have either control over these products or you have property where you've allowed people to have control over these products and the Legislature has said, "Under those circumstances, we don't care how it happens but if those products cause damage you're liable". Do you find difficulty with that?

Mr. Matthews: Judge—Justice, what I find the difficulty with is that doesn't include all of the dischargers. If I'm, if I'm the—

Chief Justice Wilentz: Well let's assume, let's assume the Legislature has said, "You're liable and so (p. 13) are others liable who discharge and you'll be jointly and severally liable as far as the injured party is concerned and you can arrange contribution between and among each other". Any problem with the Legislature's power to do that?

Mr. Matthews: Not if it's done in a way so that my right to contribution is a meaningful right.

Chief Justice Wilentz: Well you'll have the same meaningful right that other people have. If the person you're entitled to get contribution from doesn't have any money, you're liable not to get the contribution, I guess.

Mr. Matthews: I understand that, Judge, but not necessarily where I am in a situation where I've got to go chase everybody else and, and—

Chief Justice Wilentz: You think you are entitled to special treatment by way of contribution doctrine?

Mr. Matthews: I think, Justice, that my, my problem is that the, that, that the statute does not make it

clear how the contribution thing will work. If I end up putting up the whole 2.1 million dollars and then I chase the other nine people and I end up with five of them who are insolvent or absconded or they're gone,—

Chief Justice Wilentz: That could happen at the end of litigation too though, couldn't it? I mean,—

Mr. Matthews: I understand that, Judge, but, (p. 14) but we're then arguing in a normal contribution case—

Chief Justice Wilentz: Well let, let me find that again. Let's assume that the kind of liability I spoke of would be constitutionally within the power of the Legislature and let's assume that they have no treble damage and no notification, no business about having to put up the money for the cleanup. They just sue you. The State, let's say, under the statute has the right if it cleans up to sue you for the damage or one of the neighboring property owners could and they sue you, you'd have to pay ultimately. You could look around for contribution. Do you have any problem with the proposition that the State could, in that statute, provide for treble damages?

Mr. Matthews: Judge, Justice, in, in, in the statute they've provided for the right to sue and they didn't provide for a treble damage.

Chief Justice Wilentz: I'm, I'm not now talking about the statute.

Mr. Matthews: I understand that. I think that you could not broadly put a treble damage provision in the way this act is applied.

Chief Justice Wilentz: Forget about the way this act is applied. Let's assume there's another act that

simply makes you liable for polluting, for discharging and it provides ordinary lawsuit and you have to pay treble (p. 15) damages.

Mr. Matthews: If, if you are in fact the polluter, the person who makes the discharge?

Chief Justice Wilentz: You're the discharger. Maybe you're also just the landlord who allowed someone to come onto the property to do it but you knew in advance that that action on your part might render you liable.

Mr. Matthews: Justice, I would still have problems with the act because there, there would be a class of people who would end up being made to pay treble damages who are totally innocent persons.

Chief Justice Wilentz: Totally innocent in the sense that they were not the actual dischargers?

Mr. Matthews: That they were not the actual discharger. They had no notice of the discharges. They just happened today, thirty years after something was disposed of in 1950—

Chief Justice Wilentz: Now you're talking about the problem that arise in such a statute when the damages were all caused before the date of the statute.

Mr. Matthews: It's, it's, it's it's not just that, your Honor, but when the statute was—I'm sorry. When the discharge was done, if we're going to call it a discharge, it was the disposal, let's say, of waste in a responsible manner in conformance with the law at the (p. 16) time. Subsequent technology now says that discharge or that action has polluted the environment. I have no problem

with the concept of holding the people responsible who did it but to say that they should be subjected to treble damages when their actions conformed in all manners and respect to, to, to the law at the time, I have a difficulty with it.

Chief Justice Wilentz: If they could be subjected to treble damages. Forget about the innocents who one doesn't want unfairly to subject to liability, but let's assume we have someone that you agree could be subjected to treble damages. Do you have any doubt about the State's ability to forego a treble damage remedy if the party is willing to put up the money up front to clean up the discharge.

In other words, if the State says, "You can be relieved of your treble damage responsibility if you will put up X hundred thousand dollars and we will allow you later to litigate that amount".

Mr. Matthews: I guess I'd have problems with it but it's probably constitutional.

Chief Justice Wilentz: Isn't that what this statute could be looked at as doing? Giving up the treble damage remedy on condition that someone puts up the money front?

(p. 17) Mr. Matthews: I don't think so, your Honor, because under the, the, the example that your Honor used presumably there would be a negotiation in which there would be a bargaining. There's no bargaining in here.

Chief Justice Wilentz: The statute has taken care of the bargaining.

Mr. Matthews: Well, no, it hasn't taken care of the bargaining, your Honor. The statute actually gave the DEP two courses of action. They could clean up or ar- State's ability to forego a treble damage remedy if the range for the cleanup, or they could direct us to clean up or arrange for the cleanup. That's not even what they did here. What they did was they arranged for the cleanup and directed us to pay the money to do that so that they really didn't even do what the statute allows them to do.

Chief Justice Wilentz: Are the damages here in this case all—do they all predate—in other words, do the discharges all predate the day when the treble damage aspect of the law became effective, the discharges themselves?

Mr. Matthews: No, your Honor. Some, some of the discharges clearly post-date the statute. Whether some of them predate—

Chief Justice Wilentz: The treble damage, the treble damage part of the statute.

Mr. Matthews: Yes, your Honor.

(p. 18) Chief Justice Wilentz: They post-date it?

Mr. Matthews: Yes, your Honor. They're, they're apparently and, and again I'm saying this based on a relatively incomplete record, but it apparently is clear from what I know that in 1984 when this problem was first discovered at one of the sites in West Milford, there was a leaking tank at that time and that tank was removed.

The Court: Counsel, doesn't the State seem to take the position that treble damages really apply to so-called recoverable costs and it argues in its brief that in the cost recovery proceeding, that's the arbitration proceeding presumably, you would be in a position to argue that the

costs that were assessed were unreasonable in some amount and it would only be the costs that are ultimately determined to be reasonable that treble damages would refer to? And it suggests that if, for example, you are one of several responsible parties, it's within your power to make a determination as to how much might reasonable be assessed against you, pay that amount and if you're correct you would not be responsible for treble damages. If you're incorrect in any amount treble damages would only be applicable with respect to that, that amount.

Mr. Matthews: Your Honor, I think your analysis is correct but the problem is that's a heck of a gamble for me to have to take knowing—I got a directive today. (p. 19) Thirty days from now I've got to make a decision. DEP doesn't tell me why they issued the directive. They don't tell me the basis for the directive. They don't tell me any of the underlying reasons that justify the directive. They just say to me, "Pay me two and a half million or 2.1 million dollars". How can I make an informed judgment as to, to what would be a recoverable cost in a cost recovery action and what wouldn't be? If I make a decision today to pay a million dollars because I think that that's probably what I would be responsible for based on what I know and it's a 2.1 million dollar directive and I'm off by $400,000.00 my client—when I say I, I mean the client, it's already cost them more money and they've gambled because they were wrong and they've lost. And we're not, I don't think within the constitutional framework and ex parte Young (sic), we're not required to make that uniformed decision. We're not required to take that gamble and we're not required to, to, to be put in that position.

The superfund statute, the federal statute, is very, very similar in nature but what saves that statute is the fact—there's two things, three things actually. One, they can give you the directive, the 106 order in an emergency situation where there, where there's a threat to health, safety and welfare. Under those circumstances they don't give you the hearing, the pre-enforcement hearing. (p. 20) But, but there's the emergent situation. There's a finding specifically of the emergent situation.

In that case if you don't comply with the directive you get two things. One, treble damages are not mandatory but are discretionary and, two, you have a good faith defense at the post-enforcement proceeding where if, if, if you've acted in good faith you don't get subjected to the treble damage provision. And if there was the same such provision in the Spill Fund Act I think that that would save it's constitutionality.

Chief Justice Wilentz: But this, this gamble that you take, the State could relieve you of the gamble by simply having a treble damage statute. You'd have no gamble at all. Your gamble would be going into the business of dealing in materials that could lead to treble damages. The State, one might argue, as I think the DEP is arguing, has in effect given you a change to reduce your gamble or at least perhaps to cut it down. The State has made the decision that instead of the maximum deterrents against the spills that, I guess, a treble damage statute with no out would give to the people of the State, it opted for a statute that might bring some money up front so there could be greater efforts to clean up sooner rather than later. And, and it did that through this treble

damage device where you can buy your way out of treble damages (p. 21) by putting up that money. You see, it's hard for me to understand why if the State can require treble damages at the end of a lawsuit, why it cannot do what is essentially a lesser act of compulsion on you?

Mr. Matthews: Justice, I'm not sure they, they could require treble damages in the context of this statute as a flat requirement.

Chief Justice Wilentz: For the same reasons that you mentioned before, I gather?

Mr. Matthews: But I think what we have to do is we have to say, "Why is treble damages here?" If the State had enacted a statute and said, "Kimber Petroleum, you cannot challenge the efficacy of any directive issued by the DEP", period, I don't think anybody in this room would have problems with that statute being unconstitutional. It says you may not have a judicial review at any time of an action of an agency and ex parte Young and all of those cases make that clear. What they've done here is they've, they've—they haven't done that but they've effectively done that by saying, "It's going to cost you three times to try and litigate that issue. If you want to challenge the DEP, if you want to be bold enough to do it, it's going to cost you three times what your real liability should be which is the cost of cleanup".

Chief Justice Wilentz: They could have said, (p. 22) "You're going to pay three times, period".

Mr. Matthews: I'm not sure they could have, your Honor. But, but that's not what they've done here. They've

enacted a treble damage statute to try and coerce people into cooperate—

Chief Justice Wilentz: Putting money up front.

Mr. Matthews: It's not a matter of putting money up, up front, your Honor. They—

Chief Justice Wilentz: I mean, that's the purpose, isn't it? I'm not suggesting that makes it right but that is the purpose, is to get more money so there can be more cleanup sooner rather than later.

Mr. Matthews: That may be the purpose but if that is the purpose and if we accept that as the purpose it still doesn't justify their conduct and their actions. It doesn't make the statute constitutional.

The Court: If the State has the right to insist upon the immediate posting of costs what would prevent an alleged discharger or responsible party from disregarding that directive if there aren't treble damages or some other penalty that could be affixed if costs were not put up?

Mr. Matthews: Justice Handler, I think that there can be a penalty but it shouldn't be mandatory treble damages. It should be discretionary treble damages and, and it should be in cases where there is not a good faith (p. 23) defense. The interesting thing is—

The Court: Then those issues, however, would be the subject of post-proceeding litigation and wouldn't that suggest that in a lot of cases a lot of responsible parties would not put up costs and prefer to take their chances in a later litigation?

Mr. Matthews: It might, yes, your Honor. But, but that's not unjustified. Again if the DEP were to give you your pre-enforcement hearing and explain to you the justification you're then in a position to make a rational decision.

Chief Justice Wilentz: And that's what the DEP is worried about is when is the then? That's what the Legislature is worried about. They do not want these things to the extent they can constitutionally arrange it, to get determined five years later after all of the spill has done all of its damage.

Mr. Matthews: And if a party acts in bad faith in refusing to put up the money, then five years later they should be hit for treble damages and with other penalties.

The Court: Mr. Matthews, tell me, what is it you want the DEP to explain to you?

Mr. Matthews: I'd like them to explain to me how they arrived at what's, what's to be in the directive, (p. 24) what's the justification for it. Is there a scientific basis in fact for including Greenbrook.

The Court: Forgive me. Did you finish it?

Mr. Matthews: Justice, all I wanted to indicate was that, that I've talked to people who seemed to say that in fact there is probably a natural barrier that would prevent any pollution in the Standsby Court area from ever going to Greenbrook. That's apparently something the DEP's never considered.

The Court: I guess my question is, is this. I'm curious as to how it works out in the real world. The DEP issues

an order to your people. Don't you talk to them? You know, this is government. Don't you go over there—

Mr. Matthews: Justice Clifford,—

The Court: "What are you hitting me with all this money for? Give me an explanation", and don't they give it to you?

Mr. Matthews: The very day—

The Court: You may not be happy with it but isn't that the way it works?

Mr. Matthews: The very day I became retained in this matter I sought a meeting with the DEP and I had a meeting with the DEP and they virtually answered no questions. We sent to—

(p. 25) The Court: Are you saying they stonewalled you? They wouldn't answer any questions?

Mr. Matthews: In essence. Justice Clifford, we sent a letter—when I say we, the three respondents in this letter—and it was sent by Mr. Warren, Bill Warren, sent a letter to DEP which requested answers to fifteen specific questions that we had as to this directive. That letter was sent I believe in July. I have the letter here. I could find it. We still have not had a response to that letter.

The Court: Well have you gone down and knocked on their door? I mean the kind of money you're talking about here I would think it might not be too difficult to get a meeting with some assistant commissioner, maybe even the commissioner, somebody who would presumptively be in a position to furnish information. Have you tried that?

Mr. Matthews: Justice Clifford§ we've asked for meetings and we end up with people who basically say —they listen to us. They're very nice but we have to go back and talk to our people. The one of the things that we were specifically told and I said at one of the first meetings, "We'll put up the money. We'll put up the 2.1 million dollars. Let's have a consent order and we agreed in that consent order that at some time at (p. 26) proceeding subsequent to this we get the right to challenge the efficacy of your order and have a judicial determination on whether that order was proper", and if—

The Court: No one has ever told you how they arrived at the sum covered in their directive?

Mr. Matthews: Justice, there is a report from BCM that seems to have figures on it but if you read that report it talks about the new water system in Standsby Court and says it would be $275,000.00. When you talk to the DEP representatives they say, "Well it's really a million and half or a million one, a million two".

The Court: So you're telling me DEP has never explained to you how they arrived at the sum that's the subject, potential subject of treble damages?

Mr. Matthews: That's one of the things they've never explained to me.

The Court: You've never received a breakdown?

Mr. Matthews: Other than the BCM report which is part of the appendix.

The Court: Which they disavow, which they disavow?

Mr. Matthews: Well they haven't—

The Court: Well I'm trying to find out, is the B— have you or have you not received a breakdown? You're saying, "Yes, we did from BCM but, no, DEP doesn't believe it".

(p. 27) Mr. Matthews: Well it's not they don't believe it. It's that when you try and pin them as to certain things in the BCM report, why is this here and why is that here, then, then they kind of shift and one of the biggest examples is the $275,000.00 for Standsby Court. When you talk to DEP about that and I've had a number of conversations with Mr. Lewin, the Deputy Attorney General, we're told it isn't $275,000.00 for the Standsby Court water system. It's really like a million one or a million two.

The Court: Did they tell you how they arrived at that one, one or two million dollars?

Mr. Matthews: No, your Honor,—

The Court: Not at all?

Mr. Matthews: —they haven't told us that.

The Court: Not at all?

Mr. Matthews: Not at all.

The Court: I'm not asking you now whether they satisfy you the way they got to the 1.2 or whatever it is is okay with you and your people buy it. Have they explained it whether you completely reject it out of hand or no. Have they explained to you how you get that number?

Mr. Matthews: No, your Honor. And that's the problem. If we knew how everything was arrived at and

if we knew the justification for this we could then make (p. 28) an informed decision as to whether or not we should pay the, the 2.1 million dollars.

The Court: Mr. Matthews, assume that that statute that Justice Ohern called your attention before, the arbitrators power to grant review, supposing that applies in this case and so you're entitled at some point to a determination by the Board of Arbitrators convened by the administrator as to whether or not an assessment against your client is valid. The statute speaks of validity. And whether or not the amount required to be expended was proper and that arbitration proceeding was available to you. Does that solve your problem with the statute?

Mr. Matthews: I don't think it does, your Honor, and I'd like to read and I'll read while others are arguing that portion of the statute. And I don't think it does because we are still entitled to have a pre-enforcement hearing. We've asked DEP that. They've denied it. We're entitled to that.

The Court: Your problem being that to the extent that you have that hearing before the arbitrators if you lose that you're at risk for treble damages as to the amount by which you underestimated what you should put up so that what you're saying to the Court is that the statute requires you to pay first and fight later and if you don't pay then you're liable for treble damages to the extent that you (p. 29) underestimate what you should put up.

Mr. Matthews: Yes, your Honor, but it's even more important and this gets into the whole question of the

arbitariness of the way the statute's being applied, the State says in their brief if I put up a million dollars I'm only going to be subjected to treble damages on the other 1.1 million and the directive is actually 1.8 million now. So if I put up a million I'm only going to be subject to treble damages on the $800,000.00. But the statute doesn't say that. That's apparently the interpretation now being given by the, the DEP and the Attorney General's office.

Chief Justice Wilentz: You think the statute might be interpreted to require you if you lose to be liable for three times 1.8 million even though you put 1 million up?

Mr. Matthews: I would hope not but what I'm saying is that the statute is unclear on that and I could be faced two years from now in a case with a new Attorney General and a new commissioner over at DEP who decide that that is their position and I could be litigating that issue and the statute should be clear on that.

The Court: Do you make any point of the fact that the statute only gives the DEP authority to direct you to clean it up and not to direct you to put up money?

(p. 30) Mr. Matthews: I, I take—

The Court: And does that, does that make—does that have any effect on the validity of the treble damage provision. The treble damage provision, as I understand the statute, says this, "If you don't comply with a directive to clean up or arrange for the cleanup then you're liable for triple the cleanup costs". It does not say, read literally, that if you don't put up money that the DEP asked you for you're liable for three times that amount. In fact the statute doesn't purport to give the DEP au-

thority to direct you to put up money. Does that distinction, the fact that their directive is not literally auhorized by the statute have any bearing on your claim that the statute's unconstitutional?

Mr. Matthews: I don't think it does because one, my view is that just shows another one of the arbitrary ways in which the DEP is applying the statute. But if this Court were to say to them, "You can't do that. You have to direct them to clean it up or you have to direct —you clean it up yourself and then, and then bill them", and incidentally in that second procedure, of course, we'd have the full right to litigate the issues, but what would happen is they could turn around presumably and take the very directive they have and say, "There's the cleanup. Go do it". And again I don't think that they should have (p. 31) the right to do that. If they tell us to clean it up we should go in. We should do a study and then make a decision on the cleanup. One of the problems that we have here is we've put the cart before the horse on the cleanup. We have a plume here that's been there for two yars. They're saying, "Put in a new water system", and now in September or the end of August they come to us and say, "By the way, if you want to talk about cleaning up the plume we're willing to listen to you". So we're going to spend 2.1 million dollars to put in a new water system, then we're going to clean up a plume and when that plume is cleaned up we may find out we didn't need the water system.

The Court: But they say that there are people now who don't have an adequate water supply. They can't drill wells because of the threat of contamination and

there is a present problem that, that requires some immediate attention.

Mr. Matthews: Justice Handler, they say that but, but I'm not sure that's a genuine argument. The people that they make that argument as to, and there's two groups of people. There's the people in Standsby Court and the people in Greenbrook. In the case of the people in Greenbrook, they've had that problem for seven, eight, nine years and it has nothing to do with the problem here.

(p. 32) The Court: They disagree with that. They say that this plume which is advancing in a certain way with certain carcinogens exacerbates that problem.

Mr. Matthews: They say that, Justice Handler, but there's nothing in the record, I submit, that shows that the plume is moving in that direction. The plume was plotted once fifteen or eighteen months ago and has never been plotted since. There's no evidence that the DEP has that shows that that plume is moving towards Greenbrook Estates.

Chief Justice Wilentz: Does the Court have any further questions of Mr. Matthews? Any further point you want to make now, Mr. Matthews?

Mr. Matthews: Yes, your Honor, just one additional point that I would like to make. The order that this Court entered on, on October 20th, 1986 required that within thirty days of that order we should put up the money or put up a bond in order to maintain, presumably, the status quo. If—and that's to be done in the next few days. If we are required to do that we will lose the one remedy that the State says that we have under this case which

is the refusal to pay the money and then get into a cost recovery action in which we can fight about whether or not the cleanup was proper. What I'm saying, in essence, is that if we're required to put that money up now we will (p. 33) —and we aren't—we don't prevail on our, our appeal before this Court, we would be in a worse situation than we would have been in the day that we got the directive because we will no longer have the choice of refusing to, to pay the money and going through this proceeding which we may be subjected to treble damages. And for that reason I would ask that the Court consider extending that stay or the requirement for us to put the money up until such point as, as it's ruled on the issues in this case.

Chief Justice Wilentz: The purpose of the order was to relieve you of the risk of treble damages for having refused to put up the costs or a bond as had been added by the order. But aside from that relief the Court has taken the position that on an interim basis, balancing the interests involved, that to the public as well as to the litigants, that the costs have to be put up.

Mr. Matthews: I understand that, your Honor, and, and what I'm suggesting is that we end up being penalized losing the one remedy that would have had.

The Court: How are you prejudiced, Mr. Matthews? I don't understand.

Mr. Matthews: Well if we put the money up at this point we, one,—unless as Justice Ohern has suggested we can go to arbitration and then fight about it, we're in the position where the money is put up and is gone and (p. 34) we have no opportunity to get back and we have

no opportunity to contest the validity of what the directive is designed to do.

The Court: You'd rather be exposed to the treble damage feature for the whole period of time rather than relieved of that?

Mr. Matthews: No, I wouldn't, I wouldn't, your Honor.

The Court: That's the alternative, one of the obvious alternatives of the order.

Mr. Matthews: I understand what your Honor is saying and I guess what I'm saying is I think my client would rather, if we could, make the decision when this Court has ruled on the issue.

The Court: Extend the stay. You would importune us to extend the stay to the date of decision, that is, you don't have to, you don't have to make any payment or deposit or bond until this case is decided? Is that your point?

Mr. Matthews: Yes, your Honor, and then, and then if, if we pay then, you know, we've paid knowing what we know at that point. If we don't pay we run the risk.

Chief Justice Wilentz: Thank you, Mr. Matthews.

The Court: On the other hand, if I may, Chief Justice,—

(p. 35) Chief Justice Wilentz: Yeah.

The Court: —if you were satisfied that the availability of the arbitrators to a hearing applies in your case even if you put up the money, then you're not exposed to that risk. Then you have the opportunity subsequently

to have a hearing as to whether or not the amount you were required to deposit was reasonable?

Mr. Matthews: Your Honor, if, if—yes, yes. The answer to that is correct. In essence that's what we offered to do in June, was to pay the money and let us reserve our right to have somebody later on decide whether the efficacy is there or not.

Chief Justice Wilentz: Not whether the damages were there or the amount was too great or too small but whether the order itself was proper or improper?

Mr. Matthews: No,—

Chief Justice Wilentz: You didn't reserve grounds to attack it beyond the kinds of grounds we've been talking about here?

Mr. Matthews: No, Justice, I wanted to reserve also whether or not what they were attempting to do there was proper and have an independent, if you will, judicial determination of that aspect.

Chief Justice Wilentz: Mr. Farrell?

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CERTIFICATION

I, DENISE WILKS, a transcriber approved by the Administrative Office of the Courts of New Jersey, do hereby certify that the foregoing Transcript of Proceedings in the matter of IMO DIRECTIVE OF DEPARTMENT OF ENVIRONMENTAL PROTECTION ISSUED TO KIMBER PETROLEUM, etc. and IMO J.I.S. INDUSTRIAL SERVICES LANDFILL, et al., heard in the

Supreme Court of New Jersey, Docket Nos. A-126, A-127 and A-128, on November 18, 1986, Tape AMA, Index beginning to end, Tape No. AMB, Index beginning to 1315, is true and accurate to the best of my knowledge and ability.

DATED: 12/19/86

/s/ Denise Wilks